83 - 1838

No.

Office - Supreme Court, U.S.
FILED
MAY 8 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ETC., *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

*JOHN M. CANNON
SUSAN W. WANAT
ANN PLUNKETT SHELDON
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 842
Chicago, Illinois 60606
(312) 263-5163

KENWYN A. REDDING
125 Collinsville Avenue
East St. Louis, Illinois 62201
(618) 274-1616
Attorneys for Petitioners

**Counsel of Record*

Pandick Midwest, Inc. Chicago • 454-7600

QUESTION PRESENTED

The settlement of a class action to remedy racial segregation and discrimination in public schools of the St. Louis metropolitan area provides for voluntary interdistrict busing to suburban schools of up to one-half of the black pupils residing in the city district. Petitioners objected that the terms of settlement emphasized interdistrict busing to the detriment or frustration of other provisions intended to improve schools used by the predominantly black student population in the city. The settlement envisions that at least one-half of the black student population residing in the city will continue to attend one race schools within the city district. The question presented is,

> Whether the Due Process Clause of the Fifth Amendment precludes federal court approval of a class action settlement without a reasoned response to the objections of plaintiff class members that the settlement provides disparate relief to different members of the same class where all have been subjected to the identical harm of racial segregation and discrimination.

PARTIES TO THE PROCEEDING

Petitioner North St. Louis Parents and Citizens for Quality Education is an unincorporated association including members of the plaintiff classes, primarily parents of black children attending public schools in the City of St. Louis. Other petitioners are William Upchurch, Vivian Ali, and Dorothy Robbins, individual members of said classes and the petitioner association who objected to the settlement in the courts below. In addition to Craton Liddell, the respondents under Rule 19.6 include other representatives of the plaintiff classes, boards of education in the St. Louis metropolitan area, the City of St. Louis and certain of its officials who are petitioners in No. 83-1386, the State of Missouri and certain of its officials who are petitioners in No. 83-1721, and the United States. The respondents are listed in the caption to the opinion of the court of appeals which is set out in a separate appendix to the petition in No. 83-1721 at pp. 1a-13a.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Reason for Granting the Writ	4
The Court of Appeals has Decided an Important Question of Federal Law Which has Not Been, But Should Be, Settled by This Court	4
a. The remedies were not tailored to continuing effects of the constitutional violations being settled.	5
b. The settlement provides disparate relief to different members of the same class.	7
c. There was no reasoned response to petitioners' objections.	8
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases

Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 9

General Building Contractors Association v. *Pennsylvania*, 458 U.S. 375 (1982) 5

Hills v. *Gautreaux*, 425 U.S. 284 (1976) 5

In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979) 6, 7, 8

Mandujano v. *Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) 8

Milliken v. *Bradley*,

418 U.S. 717 (1974) 9

433 U.S. 267 (1977) 6

Mullane v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) 8

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970) 9

Constitution and Statute

U.S. Const. amend. V 2, 4, 8, 10

28 U.S.C. § 1254(1) (1976) 2

Other

MANUAL FOR COMPLEX LITIGATION § 1.46 (4th ed. 1977) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ETC., *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, North St. Louis Parents and Citizens for Quality Education, etc., *et al.* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Craton Liddell, etc., et al.* v. *North St. Louis Parents and Citizens for Quality Education, etc., et al.*, No. 83-2220 below.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported. It is reproduced in No. 83-1386 Pet. App. A406-A481 and No. 83-1721 Pet. App. 1a-94a.[1] The opinion of the district court is reported at 567 F.Supp. 1037 and is reproduced in No. 83-1386 Pet. App. A1-A51 and No. 83-1721 Pet. App. 95a-147a.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "... nor shall any person ... be deprived of life, liberty, or property, without due process of law. ..."

STATEMENT OF THE CASE

This case originated in 1972, as a class action against the Board of Education of the City of St. Louis to remedy racial segregation and discrimination in the city's school system.

[1] The petitions in No. 83-1386, *Hon. Ronald A. Leggett, et al.* v. *Craton Liddell, et al.*, and No. 83-1721, *State of Missouri, et al.* v. *Craton Liddell, et al.*, also seek review of the judgment of the court of appeals in this case. Materials required to be reproduced by Rule 21(k) are included in those previously filed petitions and the appendices thereto. We refer to such petitions and appendices where appropriate, rather than duplicating the materials found there.

Since that time other parties have been joined, including suburban school districts and the State of Missouri. Although the case originally involved only a claim of intradistrict segregation and discrimination against the city school district, it subsequently was expanded to include interdistrict claims against suburban school districts in the metropolitan area.

In 1980, the city school district and the State of Missouri were found liable on the intradistrict claim. The court-ordered remedy included both the implementation of a mandatory intradistrict desegregation plan within the city public school system and the development of a plan to encourage voluntary transfers between the city school district and suburban school districts.

On July 5, 1983, the United States District Court for the Eastern District of Missouri approved a settlement resolving the interdistrict phase of this litigation. It provides several forms of relief including interdistrict busing. At any given time, the busing option may be utilized by up to one-half of the approximately 30,000 black pupils who otherwise would be in one race city schools. Under the settlement the State of Missouri was ordered to pay receiving districts the full cost of educating the students who are bused to those districts in addition to the full cost of busing. It was ordered to continue one-half of the normal state aid to the sending district for each student who is bused to another district. The settlement also has provisions which are intended to improve the general quality of education within the city. The state and city were ordered to share the cost of such improvement equally.

Petitioners, after being denied the opportunity to intervene on behalf of black students who would continue to use the city schools, filed written objections to the proposed settlement. They asserted that the settlement placed disproportionate emphasis on interdistrict busing to the detriment of those black students who will remain in predominantly black city schools.

The district court made no response to the substance of petitioners' objections and did not evaluate the adequacy of the

quality education provisions in relation to the objections. The opinion noted only that opposition to the settlement existed, that it was not overwhelming in light of the nature of the suit, and that it had been considered. No. 83-1386 Pet. App. A19-20; No. 83-1721 Pet. App. 113a-115a.

On February 8, 1984, the United States Court of Appeals for the Eighth Circuit affirmed the settlement with modifications. The court struck certain quality education provisions as being unrelated to the integration process.

The Eighth Circuit ruled that the failure of the district court to make a reasoned response to petitioners' objections had not deprived them of due process of law because the settlement contains quality education provisions to compensate students who do not bus. It made no assessment of the adequacy of the quality education provisions for that purpose. 83-1386 Pet. App. A460-461; No. 83-1721 Pet. App. 71a-72a.

REASON FOR GRANTING THE WRIT

The Court of Appeals has Decided an Important Question of Federal Law Which has Not Been, But Should Be, Settled by This Court.

Achieving equal educational opportunities for children who are subject to the continuing effects of racial segregation and discrimination is a difficult task that often requires a balancing of competing interests. Improved educational programs and various busing options to achieve the integration which would have occurred in the absence of a constitutional violation are both available as remedies. When the focus of a desegregation plan minimizes and even impedes educational improvement for a significant portion of the victims in order to provide racial integration for others, however, the Due Process Clause of the Fifth Amendment demands at least a reasoned response to the objections of the former.

The importance of fashioning a remedy that is fair and equitable to all parties who suffer constitutional harm is indisputable. A remedy must be achieved that addresses and corrects the specific deficiencies that have resulted from segregation or discrimination. If this is not accomplished, the continuing inequities will not be cured and the remedy fails.

The settlement approved by the courts below fails in just this way. It provides a grossly disparate remedy to some black students who receive virtually all the relief to which they could be entitled and possibly more. Other black students, subject to the identical constitutional harm, receive comparatively little and may even be worse off. The decisions below have far reaching consequences on the rights to which victims of discrimination within a class are entitled. Because of the importance of assuring equal educational opportunities to all, the decision of the court of appeals should be reviewed by this Court.

a. The remedies were not tailored to continuing effects of the constitutional violations being settled.

This Court has stated that "once a constitutional violation is found, a federal court is required to tailor the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976).

This principle serves as an important limitation on the scope of judicial authority and was recently reaffirmed by this Court in *General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375, 399 (1982).

> We read these earlier decisions as recognizing "fundamental limitations on the remedial powers of the federal courts." 425 U.S. at 293. Those powers could be exercised only on the basis of a violation of law and could extend no farther than required by the nature and the extent of that violation.

In *Milliken* v. *Bradley,* 433 U.S. 267, 282 (1977), this Court stated that the remedy in a school desegregation case should restore the victims of discrimination "to the position they would have occupied in the absence of such conduct." 433 U.S. at 282. The remedy should compensate. It should not subsidize one group of victims to the detriment of another. Any other rule would destroy the underlying rationale of the class action device, and would undermine the most fundamental principles of due process. Contrary to established principles of law, that is precisely what has been done by the settlement here at issue.

The Seventh Circuit has applied the principle of fairness to all class members in a case involving alternative settlement options. *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979). A settlement in which class members were given a choice between releasing all claims in exchange for a cash payment or losing their federal claims while retaining their state claims had been approved by the district court. The court of appeals reversed.

> As to [class members who refuse the cash payment] the "settlement" is not a settlement; it is merely an offer to settle with a penalty, the dismissal of their federal claims, if they do not accept.
>
> . . . By the terms of the order of the trial court, subclass members who do not sign the release give up their [federal] claims and the opportunity to be represented in the class action in return for nothing.
>
> . . . The dismissal of nonconsenting subclass members' claims would serve solely to benefit GM or those subclass members who accept the settlement. Reconciling such a "settlement" with notions of fair play and justice is impossible.

594 F.2d at 1135-36. The court emphasized that fundamental principles were involved even though 99.97% of the class members had indicated no objection to the settlement. It

further observed that even if a majority affirmatively supported the settlement, this would not "justify the substantial injustice to the individual rights of the minority that the form of settlement proposed here would work." 594 F.2d at 1137. In this case no more than one-half of the black pupils in the plaintiff classes will be able to utilize the busing option.

b. The settlement provides disparate relief to different members of the same class.

While differences inevitably can be found between commercial situations and civil rights issues, the central principle requiring equitable treatment of all class members has universal application.[2] The economic benefits of the settlement here at issue are not distributed equitably.

For example, state funding allocations are substantially less for schools that send students, primarily in the city district, than for the schools that receive them, primarily in suburban districts. According to the settlement, the sending school district will receive one-half the state aid normally allotted for every student who is bused to another district. The receiving school district, on the other hand, will receive state funds to cover the full cost of educating such pupils in addition to the full cost of busing. Thus, the allegedly offending suburban districts will receive a substantially disproportionate amount of the state funds which the settlement provides to compensate for harm to the plaintiff classes generally. Moreover, the parents of black children residing in the city must bear their share of the city district's obligation to fund the settlement's quality education provisions. The settlement imposes no such burden on the suburban school districts.

---

[2] It should be noted that, although the class action device provides a vehicle for furthering the policies underlying the law, it is primarily a device for vindicating the rights of individual class members. *In re General Motors Litigation*, 594 F.2d at 1128 n.33.

c. There was no reasoned response to petitioners' objections.

The objections raised by petitioners to the settlement were substantial. They not only questioned the scope of the busing remedy, but also the adequacy of the quality education provisions to remedy the continuing inequality suffered by black students who remain in city schools.[3]

Whenever a settlement attempts to compromise the legal rights of class members over their objections, it must comport with the Due Process Clause of the Fifth Amendment. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Mandujano* v. *Basic Vegetable Products Inc.*, 541 F.2d 832, 835 (9th Cir. 1976).

In *Mandujano,* the Ninth Circuit set out minimum procedural safeguards necessary to protect the interests of objecting class members which may be put at risk by pressure to settle complex litigation.

> Each objection so made must become a part of the record of the case. The trial court before approving a proposed settlement must review carefully these objections. Those determined to be substantial cannot be rejected without an opportunity to be heard.
>
> . . .
>
> The hearing which an objection of substance makes necessary must be sufficient to enable the trial court to set forth on the record a reasoned response thereto. *Such findings of fact and conclusions of law as may be necessary to support the response must also appear on the record.*

541 F.2d at 835-6. (Emphasis supplied).

---

[3] It is well settled that the proponents of any class settlement always bear the burden of proof on the issue of fairness. Manual for Complex Litigation § 1.46 (4th Ed. 1978). *Accord, In re General Motors Litigation,* 594 F.2d at 1126 n.30.

The necessity of adequate findings on the record to support a remedy has been stressed repeatedly by this Court in civil rights cases. (See, *Hills, supra,* 425 U.S. at 293; *Milliken, supra,* 418 U.S. at 744-45 and 433 U.S. at 280; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1970); and *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977).

The decisions below fail to meet this standard on facts which warrant that they do. Neither court even addressed the substance of petitioners' objections to disproportionate emphasis on busing and the resulting inadequacy of the quality education provisions for their intended purpose of compensating black students who do not bus.

Among the specific objections to the settlement raised by petitioners was that the settlement's emphasis on interdistrict busing of black children to suburban districts would serve to attract the brightest black children away from the city thereby stigmatizing and diluting the quality of city schools, particularly in the predominantly black areas of north St. Louis. Such a "brain drain" could cause a psychological detriment that would be impossible to overcome with improved funding for quality education. Parents of youngsters might feel it was necessary for their children to be bused in order to get the best possible education.

The district court made no findings that the proposed quality education provisions of the settlement would give those students who do not bus an educational opportunity comparable to those who do. Such findings could have included, for example, a specific comparison of the quality education provisions with the curriculum offered in the better suburban schools. Such findings would have been directly responsive to the concerns of petitioners as expressed by their spokesman in the district court.

> We don't feel that black parents or black children have, as their primary interest, the achievement of integration. We feel that they have historically tried to achieve quality education in any way in which they could and many parents begrudgingly sent their children far away from their neighborhoods to schools because they felt they had no alternative for achievement of quality education. R. Tr. 4/29/83 at 3-27.

The district court had a duty to receive evidence and make the findings necessary to determine whether the settlement actually did offer black children two viable ways to achieve the equal educational opportunity to which they are entitled, *i.e.* to bus to a suburban school or to remain in a city school offering comparable educational facilities and instruction. Without such findings the interests of the black students who will remain in the city school district were compromised without the due process of law required by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Eighth Circuit.

Respectfully submitted,

*JOHN M. CANNON
SUSAN W. WANAT
ANN PLUNKETT SHELDON
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 842
Chicago, Illinois 60606
(312) 263-5163

KENWYN A. REDDING
125 Collinsville Avenue
East St. Louis, Illinois 62201
(618) 274-1616
Attorneys for Petitioners

---

* Counsel of Record

(7) (4) (2)

Nos. 83-1386, 83-1721 and 83-1838

JUL 23 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

RONALD A. LEGGETT, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

40pp

QUESTIONS PRESENTED

1. Whether in light of *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), and *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), the court of appeals erred in requiring the State of Missouri to fund a comprehensive interdistrict desegregation remedy in the absence of district court findings sufficient to show that the remedy was "tailor[ed] * * * to fit 'the nature and extent' " (*Dayton I*, 433 U.S. at 420) of the intradistrict violation that the State had been found to have committed.

2. Whether the court of appeals placed improper restrictions on the St. Louis Board of Education's taxing prerogatives in connection with the latter's funding obligations under the desegregation plan.

3. Whether the court of appeals erred in concluding that the desegregation remedy was fair to all members of the plaintiff class.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Discussion	19
Conclusion	35

TABLE OF AUTHORITIES

Cases:

Columbus Board of Education v. *Penick*, 443 U.S. 449	22
Dayton Board of Education v. *Brinkman*, 433 U.S. 406	*passim*
General Building Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375	20, 22
Hills v. *Gautreaux*, 425 U.S. 284	6, 16, 20, 22
Louisiana v. *United States*, 380 U.S. 145	20
Liddell v. *Board of Education*, 469 F. Supp. 1304, rev'd, 620 F.2d 1277, cert. denied, 449 U.S. 826	3
Liddell v. *Board of Education*, 491 F. Supp. 351, aff'd, 667 F.2d 643, cert. denied, 454 U.S. 1091	2, 4-5, 7, 32
Liddell v. *Board of Education*, 677 F.2d 626, cert. denied, 459 U.S. 877	2, 6, 7, 8, 30, 32
Milliken v. *Bradley*:	
433 U.S. 267, aff'g 402 F. Supp. 1096	14, 18, 20, 25, 29
418 U.S. 717	5, 6, 16, 20, 23, 28, 30
Swann v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1	20
United States v. *Chicago Board of Education*, 567 F. Supp. 272, aff'd in part, 717 F.2d 378	32

Constitution, statute and rule:

U.S. Const. Amend. XIV (Equal Protection Clause)	29
Emergency School Aid Act, 20 U.S.C. (Supp. V) 3191	32
Fed. R. Civ. P. 23	11, 24

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1386

RONALD A. LEGGETT, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

No. 83-1721

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

No. 83-1838

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (83-1721 Pet. App. 1a-94a) is not yet officially reported. The opinion of the district court (83-1721 Pet. App. 95a-147a) is reported at 567 F. Supp. 1037. Earlier opinions in the case are reported at 469 F. Supp. 1304 (1979), rev'd, 620 F.2d 1277, cert. denied, 449 U.S. 826 (1980); 491 F. Supp. 351 (1980), aff'd, 667 F.2d 643, cert. denied, 454 U.S. 1091 (1981); 677 F.2d 626, cert. denied, 459 U.S. 877 (1982).

JURISDICTION

The judgment of the court of appeals (83-1721 Pet. App. 148a) was entered on February 8, 1984. The petitions for a writ of certiorari were filed on February 21, 1984, April 20, 1984, and May 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The early history of this school desegregation case is summarized in our Briefs in Opposition in *Missouri* v. *Liddell*, cert. denied, 454 U.S. 1091 (1981) (No. 80-2152), and *Missouri* v. *Liddell*, cert. denied, 459 U.S. 877 (1982) (No. 81-2022). In order to delineate the questions presented here, that history, as well as the proceedings below, must be recapitulated in some detail.

A. The intradistrict phase of the litigation

1. This action was commenced in 1972 by a group of black parents and their children (the Liddell group) against the Board of Education of the City of St. Louis and its officials (the City Board). The complaint alleged that the City Board had maintained and perpetuated an unconstitutional dual system of public education within St. Louis. A second group of black parents (the Caldwell group), the

City of St. Louis, and the United States intervened as plaintiffs. The State of Missouri, the State Commissioner of Education, and the State Board of Education (the State parties) were joined as defendants. Following a trial, the district court held that defendants had not committed any constitutional violation. *Liddell* v. *Board of Education*, 469 F. Supp. 1304 (E.D. Mo. 1979) (Meredith, J.). It concluded that the City school system, although originally operated as part of a de jure state segregated system, had become unitary through the City Board's adoption of a "neighborhood school" policy (469 F. Supp. at 1313-1314, 1318).

The court of appeals reversed, holding that the State and the City Board had jointly maintained a segregated school system in St. Louis. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), cert. denied, 449 U.S. 826 (1980). It found that the State had statutorily mandated separate schools until 1954, and that neither the State nor the City Board had taken effective steps to desegregate the City schools thereafter (620 F.2d at 1280-1281). It held that implementation of the "neighborhood school" plan had not disestablished the dual system (*id.* at 1280-1288) and that the City Board's policies since 1954 had aggravated existing segregation (*id.* at 1288-1291). The court required the City Board "to develop a system-wide plan for integrating the [City] schools," the costs of that plan to "be apportioned among the defendants as determined by the district court" (*id.* at 1295 & n.28). The court of appeals also suggested that the City Board investigate "other techniques" to remedy segregation within St. Louis, including the possibility of developing a voluntary program for "exchanging and transferring students with

the suburban school districts of St. Louis County" (*id.* at 1296).

2. On remand, the district court held that the State and the City Board were "jointly and severally liable" for segregation in the St. Louis schools. *Liddell* v. *Board of Education*, 491 F. Supp. 351, 357 (E.D. Mo. 1980) (Meredith, J.). It found that the State, "which prior to 1954 mandated school segregation, never took any effective steps to dismantle [that] dual system" (*id.* at 357). It accordingly concluded that the State parties were "primary constitutional wrongdoers who have abdicated their affirmative remedial duty" to "obliterate all vestiges of * * * state-imposed segregation" (*id.* at 359). By way of remedy, the court approved a comprehensive intradistrict desegregation plan, and ordered that the State pay half its cost (*id.* at 353, 357). The court also ordered, in paragraph 12(a) of its decree, that the City Board, the State, and the United States "make every feasible effort to work out with the appropriate school districts in the St. Louis County * * * a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis" (*id.* at 353).

The court of appeals affirmed. *Liddell* v. *Board of Education*, 667 F.2d 643 (8th Cir. 1981). It agreed with the district court's conclusion that the State parties were "primary constitutional wrongdoers" and found no abuse of discretion in the district court's ordering the State to pay half the cost of the intradistrict plan (667 F.2d at 655). It also rejected the State's challenge to paragraph 12(a) of the decree, a challenge predicated on the fact that "the suburban school districts [had not been] joined as parties" (667 F.2d at 650). The court noted that the State had

been ordered only to "make every feasible effort" to work out a voluntary interdistrict plan, that paragraph 12(a) "must be viewed as a valid part of the attempt to fashion a workable remedy within the City," and that, "[b]ecause the plan [was] to be voluntary," no question of enforcement was involved (*id.* at 651).

The State petitioned for certiorari, contending that it was not responsible for school segregation in St. Louis, that it should not have been ordered to fund any part of the intradistrict plan, and that paragraph 12(a) of the decree exceeded the district court's remedial authority (80-2152 Pet. 5, 12, 20). On the latter point, the State argued that, under *Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717 (1974), it could not be required to help develop a voluntary interdistrict plan absent the finding of an interdistrict violation (80-2152 Pet. 20-24). The United States opposed certiorari. We noted that a State may properly be ordered "to pay part of the costs of desegregation" where it has "abdicat[ed] [its] affirmative duty to disestablish the *de jure* system for which [it] bear[s] responsibility" (80-2152 Br. in Opp. 13). And we noted that, while *Milliken I* "prohibits the imposition of relief upon nonparty school districts," a court may permissibly "order those who have been found liable to make efforts to persuade those nonparty districts to cooperate voluntarily" (80-2152 Br. in Opp. 14 & n.17 (emphasis omitted)). Certiorari was denied (454 U.S. 1091 (1981)).

3. While the State's Petition in No. 80-2152 was pending, the district court (Hungate, J.) held hearings on the proposals submitted in response to paragraph 12(a) of its decree. On July 2, 1981, it approved a 12(a) plan for voluntary student exchanges between the City and the suburban school districts

(81-2022 Pet. App. A73-A108). The plan included fiscal and educational incentives designed to encourage students and suburban school districts to participate; participation was voluntary on the part of both. The district court concluded that the plan was "directly related to remedying racial segregation in St. Louis" and that it was "conducive to obtaining a proper level of constitutional compliance" by the State (*id.* at A106, A108). Fifteen suburban districts and approximately 1,200 students eventually agreed to take part in the 12(a) plan (83-1721 Pet. App. 23a, 112a). The State was ordered to pay the cost of this plan in full (81-2022 Pet. App. A102-A103).

The court of appeals affirmed. *Liddell* v. *Board of Education*, 677 F.2d 626 (8th Cir. 1982). It noted its previous holding that the State "had substantially contributed to the segregation of the public schools of the City of St. Louis" (677 F.2d at 629 (footnote omitted)). And it held that "[p]aragraph 12(a) [was] entirely enforceable against the state defendants" because they were "primary constitutional wrongdoers and, therefore, [could] be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district" (*id.* at 630 (citing *Hills* v. *Gautreaux*, 425 U.S. 284 (1976)).

The State again petitioned for certiorari, contending that it could not under *Milliken I* be required to bear the cost of the 12(a) plan absent a finding that it had committed an interdistrict violation (81-2022 Pet. 7-13). It noted that it had been found liable only for an intradistrict (city-wide) violation and that the 12(a) plan, while voluntary as to the suburban districts, was involuntary as to it. The United States

again opposed certiorari. We noted that "[t]he 12(*c*) plan was part of the district court's effort to remedy segregation within the City of St. Louis" and that, under *Hills* v. *Gautreaux*, *supra*, the State parties could be "required to take appropriate remedial action for the constitutional violations in which they participated" (81-2022 Br. in Opp. 8 & n.10). Certiorari was denied (459 U.S. 877 (1982)).[1]

B. The interdistrict phase of the litigation

1. While these appeals were pending, the trial court began proceedings to consider plaintiffs' charges of interdistrict violations. Although no interdistrict violations had been found, paragraph 12(c) of the original decree had, anticipatorily, ordered the City Board and the State to develop a "feasibility plan" of interdistrict relief designed "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis *and St. Louis County*" (677 F.2d at 629 & n.2, 639; 491 F. Supp. at 353) (emphasis supplied). Paragraph 12(c), unlike paragraph 12(a), envisioned a plan in which participation by suburban school districts would be mandatory rather than voluntary, and in which county-wide, as well as city-wide, school segregation would be addressed.

---

[1] The State's Petition in No. 81-2022 also contended (Pet. 13-23) that the court of appeals had erred in upholding the district court's adoption of a plan for merging the vocational education programs of the city and county schools—referred to as "the 12(b) plan"—based on a finding that the State had violated the Constitution "by failing to merge [those] segregated * * * programs" earlier (677 F.2d at 628, 632). Certiorari was likewise denied on that issue (459 U.S. 877) and no question concerning the vocational education programs is presented here.

Pursuant to paragraph 12(c), the Caldwell plaintiffs moved to join as additional parties defendant the 23 suburban school districts in St. Louis County (83-1721 Pet. App. 138a-139a; C.A. App. 7, 93-94). The Caldwell group likewise moved to amend its complaint to allege that the State and the suburban districts had established, with segregative intent, "a racially dual system of public education in the St. Louis metropolitan area" (C.A. App. 7, 89; 83-1721 Pet. App. 139a-140a). The St. Louis metropolitan area was defined to include the City of St. Louis, St. Louis County, and two adjoining counties (83-1721 Pet. App. 140a). The City Board simultaneously moved to realign itself as plaintiff and likewise alleged interdistrict violations requiring interdistrict relief (C.A. App. 1-2, 53-85; 83-1721 Pet. App. 138a-140a). The district court (Hungate, J.) granted these motions in substantial part (C.A. App. 47-52; 83-1721 Pet. App. 138a-139a) and certified the Caldwell plaintiff class "as comprising all students, and their parents, now attending or who will attend Missouri public * * * schools located in the metropolitan St. Louis * * * area" (83-1721 Pet. App. 142a).[2]

To support their charges of interdistrict segregation, plaintiffs alleged that the State and the suburban districts, separately or in conjunction with one another, had engaged in discriminatory funding decisions, discriminatory housing and land use policies,

---

[2] Various appeals were filed from the district court's orders joining certain suburban school districts as defendants and staying proceedings against others. The Eighth Circuit in its 1982 decision held that it lacked jurisdiction of these appeals and of other interlocutory appeals filed in the interdistrict phase of the case (677 F.2d at 639, 640-641).

failures or refusals to consolidate school district boundaries, discriminatory school closings, gerrymandering of attendance areas, discriminatory pupil transportation, discriminatory faculty assignments, and discriminatory allocation of resources (83-1721 Pet. App. 139a-140a; C.A. App. 79). Defendants denied these allegations (83-1721 Pet. App. 141a). In March 1982, the district court, reversing the normal procedure, held hearings to determine what remedy it would impose in the event that it should find an interdistrict violation (C.A. App. 108-109). It declared that it would adopt a "mandatory interdistrict plan" which would dissolve the suburban districts and create a single metropolitan school district with an area-wide student transportation system (83-1721 Pet. App. 19a; C.A. App. 111-118). The court then scheduled a trial to determine whether any interdistrict violations had in fact occurred (83-1721 Pet. App. 142a).

2. No hearing on interdistrict liability took place. On the eve of trial, the original plaintiffs, the City Board, and the suburban school districts entered into an agreement "to settle the litigation involving paragraph 12(c) and the plaintiffs' interdistrict claims" (83-1721 Pet. App. 151a). The agreement was expressly made contingent on a court order establishing adequate funding (*id.* at 223a), and specified that funding should come from the State and the City Board (*id.* at 224a-226a). Neither the United States nor the State was a party to the settlement agreement.

The agreement aimed to settle plaintiffs' interdistrict claims without resort to court-ordered busing and without destroying the integrity of the 23 suburban districts (83-1721 Pet. App. 227a). It has three main components:

a. *Voluntary Interdistrict Transfers.* The interdistrict transfer plan is generally designed to encourage black students from the City to transfer voluntarily to suburban schools, and to encourage white students from the suburbs to transfer voluntarily to City schools. The transfers are to be facilitated by magnet school programs that are intended "[t]o provide broader educational opportunities to students in the metropolitan area" and "[t]o increase the desegregation of the schools in the [St. Louis] Metropolitan area" (83-1721 Pet. App. 173a). Each suburban district is generally required, over a five-year period, to increase its minority enrollment by 15%, or to 25%, whichever is less (*id.* at 159a-166a). It is expected that about 15,000 students will transfer from the City to the suburbs, and about 3,000 students from the suburbs to the City (*id.* at 23a, 153a).

b. *Quality Education Improvements.* These are designed to enhance the quality of education in all City schools, with the general objective of enabling the system to retain an AAA rating under standards set by the Missouri Department of Education (83-1721 Pet. App. 54a, 247a). The agreement mandates, among other things, a reduction in class size to a 25:1 pupil-teacher ratio (*id.* at 185a); provision of audio-visual services (*id.* at 247a); restoration of art, music, and physical education courses (*id.* at 249a); development of programs to promote computer literacy and career education (*id.* at 192a); hiring of additional school nurses, social workers, psychologists, and athletic coaches (*id.* at 250a, 262a); establishment of all-day kindergartens and pre-school centers (*id.* at 252a); expansion of services for handicapped students (*id.* at 250a); establishment of programs to improve science instruction (*id.* at 249a); and expan-

sion of the "English as a second language" program (*id.* at 260a). The quality education component of the settlement also includes special programs targeted to all-black City schools, such as a further reduction in class size (to a 20:1 pupil-teacher ratio), after-school classes, Saturday instruction, peer tutoring, summer schools, parental involvement and "role model" programs (*id.* at 197a-200a, 242a-243a).

c. *Capital Improvements.* The settlement agreement recites that "[t]he general condition of the St. Louis Public School facilities is one of rapid deterioration, extreme deferred maintenance, and general old age" (83-1721 Pet. App. 193a). It notes that in recent years "the cost of [critically needed facilities] invariably exceeded [the City Board's] funding capacities," a shortfall exacerbated by voters' repeated refusals to ratify school bond issues (*id.* at 281a-282a). The agreement accordingly mandates a program of deferred maintenance and a "comprehensive program of general renovations, associated program improvements, and modernization" of the City schools (*id.* at 283a).

3. The signatory parties—the Liddell and Caldwell plaintiffs, the suburban school district defendants, and the City Board—presented the settlement agreement to the district court for approval (83-1721 Pet. App. 103a). The court held a hearing to determine whether the agreement met the standards for approving class action settlements under Fed. R. Civ. P. 23, that is, whether the agreement was "fair, reasonable and adequate for the resolution of the 12(c) interdistrict phase" of the case (83-1721 Pet. App. 103a, 143a-144a). The court made no inquiry into the merits or substantiality of plaintiffs' allegations of interdistrict violations by the suburban districts and the State, or into the relative strength of those charges. Nor did the court inquire whether the

State's intradistrict violation had any interdistrict effects.

The district court (Hungate, J.) approved the plan without substantial modification (83-1721 Pet. App. 95a, 108a-119a) and declared that primary responsibility for funding it would rest with the State and the City Board, the "parties who ha[d] been adjudicated as liable * * * for segregated conditions within the City's public schools" (*id.* at 128a). The State was ordered to bear the full cost of implementing the interdistrict transfer plan and the magnet schools (*id.* at 96a-97a). The State was ordered to bear the full cost of implementing the quality education program outside St. Louis and half the cost of that program within St. Louis (*id.* at 96a-97a). And the State was ordered to bear half the initial costs of implementing the city-school capital improvements program, being required to match "[a]ny amount raised for capital expenditures by [the] City Board through a voter-approved bond issue at any time during 1983-1984" (*id.* at 97a, 127a). Estimates of the settlement's first-year cost ranged from $37 million to over $100 million (*id.* at 128a). The State's share for the 1984-1985 school year is estimated to be $49 million (*id.* at 87a). The suburban school districts were not required to pay anything (see *id.* at 20a).

The City, the State parties, and the United States objected to these funding provisions, contending that they exceeded the scope of the intradistrict violation shown on the record (83-1721 Pet. App. 105a, 113a). The district court rejected these arguments. It concluded that it "ha[d] the authority to order the State * * *, which has already been adjudicated a primary constitutional violator in causing school segregation in the City * * *, to fund the voluntary interdistrict transfers and [the] improvements in the quality of education * * * in order to further remedy the State

defendant's constitutional violations" (*id.* at 129a). And it concluded that it "ha[d] the authority to order the City Board, already adjudged a constitutional violator, to increase its tax rate, if necessary" to fund its share of the agreement's cost (*id.* at 129a-130a). Although the Court did not order an immediate property tax increase, it ordered the City Board to submit a new bond issue to the voters (*id.* at 97a) and enjoined a scheduled reduction in the City Board's tax rate (*id.* at 130a, 133a-134a).

4. A divided court of appeals, sitting en banc, affirmed the district court's order in substantial part (83-1721 Pet. App. 1a-94a). In the majority's view, the settlement agreement, although drafted in response to plaintiffs' allegations of interdistrict segregation by both the State and the suburban districts, also served in large measure to remedy the State's proven intradistrict violation. The court thus held that the State could be required to fund the bulk of the plan even though it was not a party to the settlement and even though it had not been found to have committed any interdistrict wrong.

a. The majority viewed the interdistrict transfer plan as "intrinsic to an effective remedy for the [State's] intradistrict violation" (83-1721 Pet. App. 25a). Because "[t]he potential for integration within [St. Louis] was limited by the fact that almost eighty percent of the students were black," interdistrict transfers, in the majority's view, were necessary to "return[] the largest number of victims to integrated schools" (*id.* at 32a, 34a). The court rejected the contention, advanced by Missouri and by the United States (*id.* at 22a), that the district court's factual findings were insufficient to support the remedy it decreed. Rather, the court of appeals concluded that the interdistrict transfer plan "was closely

tailored to the nature and scope of the violation" (*id.* at 31a), noting that "the State's presence in public education [was] immense" and that the State had previously maintained a de jure dual school system (*id.* at 32a). The court held that "the remedial limits imposed by *Dayton Bd. of Educ.* v. *Brinkman* [*Dayton I*], 433 U.S. 406 (1977), [were] inapposite to this case," reasoning that "[t]he findings of *de jure* segregation which distinguish this case were absent" in *Dayton I* (83-1721 Pet. App. 32a n.10).[3]

The court also affirmed the funding order respecting many of the agreement's quality education provisions. It noted that such programs may be "proper components of a desegregation remedy so long as they relate to the constitutional violation, are remedial in nature, and [respect] local autonomy" (83-1721 Pet. App. 46a, citing *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 280-281 (1977)). The court concluded that these conditions were met in the case of programs targeted to the City's all-black schools (83-1721 Pet. App. 52a), programs "necessary to the city schools to retain [the system's] AAA rating" (*id.* at 56a),[4] and programs involving "preschool cen-

---

[3] Besides upholding the city-to-suburbs and suburbs-to-city student transfer plan, the court of appeals agreed that the State, given its "status as a violator of the Constitution" (83-1721 Pet. App. 43a), could properly be required "to pay the full capital and operating costs of magnet schools" in St. Louis. But the court reversed as remedially unjustified the district court's order that the State pay the costs of magnet schools in the suburbs (*id.* at 44a) and of the suburb-to-suburb student transfers (*id.* at 38a-39a). The suburb-to-suburb transfer plan involved 304 students (*id.* at 24a).

[4] Such programs included library and media services, audio-visual services, reduction in class size, and restoration of art, music, and physical education programs (83-1721 Pet. App. 56a).

ters, planning and program development, all-day kindergarten, parental involvement, desegregation planning, long-range planning, and public affairs" (*ibid.*). These programs, in the court of appeals' view, were needed "to overcome the inequalities inherent in dual school systems" (*id.* at 46a) and "to enhance the appeal of the city school system, thereby promoting the chances of a stable and successful voluntary desegregation plan" (*id.* at 47a). The court held that the State could properly be required to pay half the cost of the enumerated programs, rejecting its argument that the district court had erroneously "approved funding for general education improvements * * * unrelated to desegregation" (*id.* at 50a). But the court found "[in]adequate support in the record" for the other quality education programs in the settlement agreement, concluding that they had not been shown to be "essential as remedial or compensatory" (*id.* at 56a).

Finally, the court upheld the capital-improvement aspects of the settlement. It concluded that the State "had an obligation to pay one-half of the costs of [a] program necessary to restore the city [school] facilities to a constitutionally acceptable level" (83-1721 Pet. App. 58a-59a). And it sustained the City Board's funding obligations as to the other half of the costs, while disagreeing with the district court's orders directing precisely how that money should be raised.[5]

---

[5] Specifically, the court of appeals found error in the district court's injunction against the scheduled property tax reduction (83-1721 Pet. App. 65a-66a) and ruled that future orders affecting the City Board's tax rate should be entered only if accompanied by factual findings "that all other fiscal alternatives were unavailable or insufficient" (*id.* at 66a). To avoid

b. Judge Gibson concurred in part and dissented in part (83-1721 Pet. App. 73a-86a). While believing that the settlement plan was "an inspired and far reaching one" (*id.* at 86a), he concluded that the majority in two respects had "improperly require[d] the State to fund a remedy far broader than [the] constitutional violation" (*id.* at 73a). Under this Court's decisions, he noted (*id.* at 77a-78a), "a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation' " (*Hills* v. *Gautreaux*, 425 U.S. at 293-294 (quoting *Milliken I*, 418 U.S. at 744)). Although "the nature of the constitutional violation by the State of Missouri ha[d] been outlined only most generally" in the litigation thus far (83-1721 Pet. App. at 73a), that violation, Judge Gibson observed, was "at most intradistrict in nature," and there was "no hint of a finding that there was an interdistrict effect flowing from [it]" (*id.* at 79a). Because the trial court had found no interdistrict violation and had made "no findings * * * as to the extent of the remedy required" to redress the intradistrict violation, Judge Gibson concluded that the record neither demonstrated the need for a comprehensive interdistrict transfer plan nor justified imposition of its cost upon the State (*ibid.*).

Judge Gibson also dissented from the majority's holding that the State must "participat[e] in funding capital improvements" within the St. Louis school system (83-1721 Pet. App. 84a). While acknowledging that the majority had "correctly describe[d] the age, deterioration, and deferred maintenance" of the

---

"serious[] disrup[tion of] St. Louis' system of school finance," however, the court permitted the injunction to remain in place for the balance of the 1983-1984 school year (*id.* at 60a).

system's physical plant, he noted that there was "no finding in the district court order [that these conditions were] related in any way to the constitutional violations of either the City Board or the State" (*id.* at 83a, 84a). Indeed, "[t]here [was] nothing to suggest that the[se] condition[s] [were] other than purely and simply the result of the neglect of the City Board to fulfill its responsibilities" under local law to maintain the schools properly (*id.* at 84a). Under these circumstances, Judge Gibson concluded, "[t]o order the State to pay half of this expense is to require a remedy beyond the constitutional wrong that has been found" (*ibid.*).

c. Judge Bowman dissented (83-1721 Pet. App. 87a-94a). He agreed with Judge Gibson that the record did not support "the interdistrict aspects of the remedy" or "the requirement that the State provide funding for capital improvements" (*id.* at 87a). But he also found the record inadequate to justify compulsory State funding "for the array of costly programs" required by the settlement's quality education provisions (*ibid.*). However laudable such amenities might be "from an educational standpoint," Judge Bowman said, the district court had authority to impose them only if they were "tailored to the incremental segregative effects that have been caused by the Constitutional violation" (*id.* at 87a-88a). The record in the case, Judge Bowman concluded, gave the court of appeals "no basis for an intelligent and principled determination" as to whether the programs approved by the district court reflected "Constitutional necessity" or amounted to a mere "judicial excursion into policy-making and educational experimentation" (*id.* at 88a).

Judge Bowman emphasized that a district court under *Dayton I* must make factual findings sufficient

to show that the remedy it decrees does no more than "restore the students in the affected school district 'to the position they would have occupied in the absence of' " the constitutional violation (83-1721 Pet. App. 90a (quoting *Milliken II*, 433 U.S. at 280)). In this case, Judge Bowman observed, the desegregation plan was not "fashioned by the district court after careful findings of fact of the kind required by" *Dayton I*. Rather, it was "fashioned by agreement of the City [Board], the suburban school boards, and the plaintiffs," whereas the State, "which must bear the brunt of the costs," had not agreed to the settlement (83-1721 Pet. App. 88a-89a).

"The process by which the settlement plan came into being," Judge Bowman pointed out (83-1721 Pet. App. 92a), "underscores the need for careful fact-finding before imposing * * * its burdensome costs upon the State." He noted that the agreement was "intended to settle the broad interdistrict claims in [the] case" and that "it would be a most remarkable coincidence if a plan [so designed] was at the same time properly tailored to cure only the effects of the intradistrict violation" (*ibid.*). He stressed that "the negotiations leading to the plan largely excluded the State," that the suburban school districts "stood to reap substantial benefits" from the settlement without putting up any money, and that "[n]one of them had any real incentive to prevent the others from piling their plates high with programs and funds" at the State's expense (*ibid.*). "Such negotiations," Judge Bowman concluded, "are inherently unlikely to produce a remedy narrowly tailored to the Constitutional wrong and any present-day educational deficiencies resulting therefrom" (*ibid.*). He would thus have reversed the district court's judgment and

remanded for further factual findings (*id.* at 93a-94a).

DISCUSSION

Unlike many school desegregation remedies, which rely to a greater or lesser degree on mandatory busing and other coercive measures, the plan approved by the district court here seeks to accomplish desegregation by creating incentives for voluntary integrative student transfers. The plan was developed in a spirit of reasonableness and compromise. The negotiations that produced it were free of the racial animus that often hobbles desegregation efforts. In these respects, the plan in Judge Gibson's words is indeed "an inspired and far reaching one" (83-1721 Pet. App. 86a). As a forward-looking attempt to accomplish stable and lasting desegregation—a result that has often eluded programs placing greater reliance on coercive techniques—the plan has much to commend it.

It is thus with considerable reluctance that we must note error in the decision below. The court of appeals, in our view, has exceeded the proper limits of federal judicial power by allocating in an inequitable manner the costs of remedying racial segregation in the St. Louis metropolitan area. In so doing, it worked a serious injustice against the State. The State of Missouri, without its consent, has been ordered to bear the cost of a comprehensive interdistrict remedy whose scope—based on the record before the court of appeals—cannot possibly be called "commensurate to the * * * violation[]" (*Dayton I*, 433 U.S. at 417) that the State was found to have committed. The court of appeals erred in approving that remedy, and its error is due chiefly to misapprehension of the principles laid down by this Court in *Dayton I*.

1. "The controlling principle consistently expounded" in this Court's school desegregation decisions "is that the scope of the remedy is determined by the nature and extent of the constitutional violation" (*Milliken I*, 418 U.S. at 744, citing *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971)). Accord, *Hills* v. *Gautreaux*, 425 U.S. at 293-294. Thus, while a federal court has the "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)), judicial remedial powers may "be exercised only on the basis of a violation of the law and [may] extend no further than required by the nature and the extent of that violation" (*General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982)). The Court has repeatedly emphasized that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation" (*Milliken II*, 433 U.S. at 282). In other words, "it must always be shown that the constitutional violation caused the condition for which remedial programs are mandated" (*id.* at 286 n.17).

In *Dayton I*, this Court clarified the responsibilities of the lower courts to demonstrate, through careful findings of fact, that their remedial decrees comport with these limitations on federal equity power. The Court "granted certiorari to consider the propriety of [a] court-ordered [school desegregation] remedy in light of the constitutional violation which [had been] found by the courts below" (433 U.S. at 409 (citation omitted)). The court of appeals had imposed a comprehensive systemwide remedy based on the district court's finding of "isolated but repeated

instances of failure by the [City] School Board to [bring about] an integrated school system" (*id.* at 410 (original quotation marks omitted)).

This Court held that the district court's findings gave the court of appeals "no warrant * * * for imposing the systemwide remedy which it apparently did" (433 U.S. at 417), a remedy that was "entirely out of proportion to the constitutional violations found by the District Court" (*id.* at 418). This Court emphasized that the relationship between remedy and wrong in desegregation cases "must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles" (*id.* at 410). "Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation" (*id.* at 420 (original quotation marks omitted)). The responsibility for making the necessary factual findings rests with "[t]he District Court[] in the first instance" (*id.* at 419). The Court acknowledged that it "is a difficult task * * * to make the complex factual determinations" needed to tailor a proper remedy in school desegregation cases, but concluded that such fact-finding was precisely "what the Constitution and our cases call for" (*id.* at 420). The Court held that "the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy" (*id.* at 419).

The court of appeals below concluded that "the remedial limits imposed by [*Dayton I*] are inapposite to this case," reasoning—with apparent reference to the statutorily-mandated dual school system prevalent in St. Louis until 1954—that "[t]he find-

ings of *de jure* segregation which distinguish this case were absent" in *Dayton I* (83-1721 Pet. App. 32a n.10). Although the full import of the court of appeals' statement is not entirely clear, the statement is incorrect as it stands. It may well be, of course, that a district court, in the case of a long-entrenched dual school system, will not find it easy to conduct the factual investigation that *Dayton I* contemplated, *i.e.*, to "determine how much incremental segregative effect" the violation has had on the racial distribution of the school population (433 U.S. at 420).[6] The "incremental segregative effect" formula, however, was simply an application to the facts of *Dayton I* of general remedial principles enunciated by the Court earlier and reaffirmed in that case. In this sense, "the remedial limits imposed by [*Dayton I*]" (83-1721 Pet. App. 32a n.10) are not confined to cases of isolated violations, or even to cases of school desegregation generally, but are "fundamental limitations on the remedial powers of the federal courts" (*General Building Contractors*, 458 U.S. at 399 (quoting *Hills* v. *Gautreaux*, 425 U.S. at 293)). This Court reaffirmed the applicability of those limitations to cases of officially-maintained dual school systems in *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 456-457 & n.5, 465-466 (1979), noting that *Dayton I* had "reiterated the accepted rule that the remedy imposed by a court of equity should be commensurate with the violation ascertained" (443 U.S. at 465). Although the extent of the violation shown on the record in *Dayton I* differs from that here, the *principles* of *Dayton I*—particularly its requirement

---

[6] The record before this Court in *Dayton I* revealed only isolated instances of segregative activity. See 433 U.S. at 410 and pages 20-21, *supra*.

that desegregation remedies be predicated on careful and detailed findings of fact—are fully applicable in this case.

2. We agree with the dissenters below that the district court failed to make the kind of factual findings required by *Dayton I*, and that the court of appeals, in the absence of such findings, erred in approving against the State the remedy that it did. The only constitutional violation the State has been found to have committed is an intradistrict violation—the failure to dismantle the dual school system in the City of St. Louis. In earlier stages of the litigation (see pages 4-6, *supra*), the State was ordered to right that wrong by funding half the cost of a systemwide plan (involving mandatory intradistrict transfers and remedial education programs) and by funding the full cost of the 12(a) plan (involving voluntary interdistrict transfers and additional remedial programs). The district court found that these measures were "directly related to remedying racial segregation in St. Louis" and were "conducive to obtaining a proper level of constitutional compliance" by the State (81-2022 Pet. App. A106, A108).

The remedy involved here, by contrast, was decreed in the interdistrict phase of the case, and was designed to settle plaintiffs' charges of interdistrict violations, not only by the State, but also by the 23 suburban districts. Since the State did not consent to that settlement, funding responsibilities could be imposed upon it only if its liability was first determined. The district court, however, made no finding that the State had committed any interdistrict violation, or that the State's intradistrict violation had any interdistrict effects (see *Milliken I*, 418 U.S. at 745). It made no finding as to the relative strength

of plaintiffs' charges against the suburban districts and the State. And it made no finding that there existed any other circumstances warranting imposition on the State of remedial costs beyond those it had already been ordered to bear in the intradistrict phase of the suit. The district court, in short, made no findings that could enable it to "tailor 'the scope of the remedy' to fit 'the nature and extent' " (*Dayton I*, 433 U.S. at 420) of the State's intradistrict violation, the only constitutional violation the State had been found liable for. The "scope of the remedy," rather, was dictated by other parties to the lawsuit, who alleged (or faced allegations of) interdistrict wrongdoing, in a settlement to which the State did not consent, and in circumstances that created no incentives at all to "tailoring" the remedy against the State.

Besides failing to make the necessary findings, the district court did not even conduct the type of proceeding that would have afforded the State a realistic chance to be heard concerning the remedial costs that it could properly be forced to bear. The only hearing the district court held in this respect was a hearing to determine whether the settlement met the standards for approving class action settlements under Fed. R. Civ. P. 23, and this hearing focused almost exclusively on the settlement's fairness to the plaintiff class (see 83-1721 Pet. App. 108a-119a). Although the State was permitted to voice objections to the funding obligations proposed to be placed upon it (*id.* at 113a), the hearing was not designed to permit a defense against plaintiffs' charges of interdistrict wrongdoing. And the State was given no opportunity to build a record concerning the extent of its intradistrict constitutional violation, the effects flowing from that violation, or the magnitude of the cost that

it could reasonably be expected to bear in order to correct its wrong.[7]

The court of appeals attempted to salvage the settlement by paring away some of its more extravagant growth. But while that court could offer its conclusions that there was "adequate support in the record" for some provisions (*e.g.*, 83-1721 Pet. App. 54a, 55a) and that "the record [did not] sufficiently support[]" others (*e.g.*, *id.* at 44a, 56a), those conclusions are no substitute for careful findings of fact by "[t]he District Court[] in the first instance" (*Dayton I*, 433 U.S. at 419). This Court emphasized in *Dayton I* that an appellate court is not at liberty to fill by intuition the gaps in a record; it may set aside "the findings of the district court [as] clearly erroneous" or it "may accept that court's findings of fact but reverse its judgment because of legal errors"

---

[7] The district court sought to rationalize its order that the State fund the settlement by asserting that "[t]he sole purpose for the expenditure of funds * * * is to carry out the constitutional responsibility to remove the vestiges of a segregated school system," and that "[i]n no way should any funding provisions * * * be construed to authorize expenditures unrelated to the City Board's desegregation obligations under the Constitution" (83-1721 Pet. App. 128a-129a). But these unsupported conclusions do not amount to the "complex factual determinations" mandated by *Dayton I* as a predicate for such sweeping relief (see 433 U.S. at 420), and a comparison with the record before the Court in *Milliken II* highlights this inadequacy. The district court there had made extensive and elaborate findings to demonstrate that each component of the desegregation plan was "essential for a school district undergoing desegregation" (402 F. Supp. 1096, 1118 (E.D. Mich. 1975), aff'd 540 F.2d 229 (6th Cir. 1976), aff'd 433 U.S. 267 (1977)), and this Court said that the record compelled it "to conclude that the decree before [it] was aptly tailored to remedy the consequences of the constitutional violation" (433 U.S. at 287).

(433 U.S. at 417-418). Here, as in *Dayton I*, "the Court of Appeals did neither" (*id.* at 418).[8]

3. Because it lacked the factual findings called for by *Dayton I*, the court of appeals erred in approving as a remedy against the State, and in ordering the State substantially to fund, each of the three major components of the settlement agreement—the interdistrict transfer plan, the quality education provisions, and the capital improvements program:

a. The court of appeals concluded that the interdistrict transfer plan "was closely tailored to the nature and scope" of the intradistrict violation that the State had earlier been found to have committed (83-1721 Pet. App. 31a). It based this conclusion, not upon its review of facts in the record or of any findings by the district court based on that record, but upon the propositions that "the State's presence in public education is immense" and that the State had failed to dismantle the dual school system in St. Louis (*id.* at 32a). This was not the sort of remedial review procedure that *Dayton I* prescribes.

Aside from the absence of trial court findings, the circumstances under which the interdistrict plan was developed should have suggested to the court of appeals that the plan was not in fact "closely tailored to the nature and scope" of the State's intradistrict violation. That plan was intended to settle plaintiffs' interdistrict claims, and, as Judge Bowman aptly said, "it would be a most remarkable coincidence if a plan [so] intended * * * was at the same time prop-

---

[8] This case, like *Dayton I*, may be "every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system" (433 U.S. at 409) as it is for the substantive remedial questions it presents.

erly tailored to cure only the effects of the intradistrict violation" previously found (83-1721 Pet. App. 92a). The plaintiff class was defined by reference to the St. Louis metropolitan area (*id.* at 142a), and the agreement recites that the purpose of including magnet schools was "[t]o increase the desegregation of the schools in the [St. Louis] Metropolitan area" (*id.* at 173a). The settlement plan, finally, was negotiated by the 23 suburban school districts who were the State's co-defendants and who, like the State, had been charged with intradistrict and interdistrict violations. The settlement they negotiated virtually absolved them of liability while requiring them to pay nothing. These circumstances again should have suggested to the court of appeals that the financial burden of the interdistrict transfer plan was not "closely tailored" to remedy a violation *by the State*, much less to remedy the *intradistrict* violation that the State had previously been found to have committed.

For these reasons, the court of appeals had no basis in the record for ordering the State to fund any part of the interdistrict transfer plan, beyond the limited part of the plan that merely subsumed the remedial obligations imposed on the State in earlier stages of the litigation. The district court had found that the remedial measures previously imposed were "conducive to obtaining a proper level of constitutional compliance" by the State (81-2022 Pet. App. A106). In the absence of proof that the State had committed an interdistrict violation, that its proven intradistrict violation had interdistrict effects, or that the previously-ordered remedial measures were demonstrably inadequate, the court of appeals lacked authority to require the State to fund a settlement designed to achieve desegregation throughout the St.

Louis metropolitan area. See *Milliken I*, 418 U.S. at 745.

b. The absence of adequate factual findings likewise infects the court of appeals' funding order respecting the quality education provisions. The court attempted somewhat to streamline this part of the settlement by reference to whether or not it found "adequate support in the record" for particular items (83-1721 Pet. App. 54a-56a). But "[b]ecause of the lack of appropriate inquiry and fact-finding below, there [was] no jurisprudentially acceptable way" for the court of appeals to determine which of these items were necessary to remedy the State's constitutional violation, and which were not (*id.* at 88a n.1 (Bowman, J., dissenting)).[9]

Faced with the absence of factual findings, the court decided to approve "those programs necessary to permit the city schools to regain, and then retain, their Class AAA status" (*id.* at 54a, 56a). But "a school classification device * * * developed by the State's Department of Education" (*id.* at 91a (Bowman, J., dissenting)) has no constitutional dimension. "Thousands of Missouri school children, over one-quarter of the total number, attend schools that lack Class AAA status" (*ibid.*). The district court made no finding that the St. Louis schools' loss of

---

[9] The court of appeals, for example, upheld funding for preschool centers, improved music instruction, audio-visual services, and a "parental involvement" program (83-1721 Pet. App. 56a). But it apparently rejected funding for after-school tutoring, improved science instruction, computer literacy services, and a "student leadership" program (compare 83-1721 Pet. App. 56a with *id.* at 192a, 249a, 253a, 258a). The court did not explain why the former were "closely tailored" to remedy the State's constitutional violation, whereas the latter were not.

AAA rating was attributable to a constitutional violation by the State, or that those schools would have maintained their AAA rating in the absence of the intradistrict violation previously found. As this Court has repeatedly held, federal court decrees "exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation" (*Milliken II*, 433 U.S. at 282). And the causal link between the violation and the condition sought to be remedied must be based, not on surmise, but on "the kind of factfinding by the district court and review by [the court of appeals] that *Dayton* mandates" (83-1721 Pet. App. 92a (Bowman, J., dissenting)).

c. The absence of adequate findings, finally, seriously infects the court of appeals' funding order respecting the capital improvements program. The settlement agreement did recite that the city schools were "in a severely deteriorated and sometimes dilapidated physical condition" (83-1721 Pet. App. 195a). But the district court did not find that this condition was attributable to a violation of the Equal Protection Clause, much less to a violation committed by the State. Indeed, the settlement agreement recites that the capital improvements were needed "to ensure a learning environment which complements and supports the instructional program in a manner which optimizes the learning process" (*id.* at 195a). In their interdistrict complaints, of course, plaintiffs alleged that the city schools' deterioration was caused in part by "discriminatory funding decisions" and by "discriminatory allocation of resources". (C.A. App. 79). But these allegations were never tried. The facts developed in a trial might show that black and white schools in St. Louis are equally dilapidated, and that this generalized condition is attributable to

voters' refusal to approve school bond issues (see 83-1721 Pet. App. 83a, 281-282a) or to the City Board's neglect of its "responsibility for maintenance of the schools' physical plant" under local law (*id.* at 83a (Gibson, J., concurring in part and dissenting in part)). In ordering the State to fund half the capital improvements in the absence of factual findings linking that remedy to the State's wrong, the court of appeals again ignored the mandate of *Dayton I*.

4. At certain points in its petition (83-1721 Pet. 11, 17, 22-23), the State apparently seeks to deduce from *Milliken I* a per se rule that a defendant can never be required to pay for desegregation relief employing interdistrict remedial techniques, even if participation in that remedial program is voluntary on the part of all others involved, unless such defendant is shown to have committed an interdistrict violation, or an intradistrict violation with interdistrict effects. This is essentially the contention that the State previously made (81-2022 Pet. 7-13) when seeking review of the order requiring it to fund the 12(a) voluntary interdistrict plan (see 677 F.2d at 630 and pages 4-7, *supra*), and certiorari on that question was denied (459 U.S. 877 (1982)).

We have already expressed our disagreement with that contention (81-2022 Br. in Opp. 8 & n.10). In our view *Milliken I* establishes no such per se rule. To be sure, once a court under *Milliken I* tailors a desegregation remedy to cure the intradistrict violation, and ascertains the cost of that remedy, that cost sets the limit of the defendant's financial liability for that violation. Consistently with *Milliken I* and *Dayton I*, however, an intradistrict violator can be ordered to fund a remedy incorporating interdistrict remedial techniques, provided (1) that participation in that program is voluntary on the part of all others

concerned, and (2) that the aggregate cost assessed against the intradistrict violator is "narrowly tailored" to—*i.e.*, does not exceed the amount appropriate to redress—the intradistrict violation shown. The error here, as discussed above (see pages 23-30, *supra*), was that the courts below made no effort thus to tailor the remedy assessed against the State.

5. The question presented is by no means unimportant. Although the choice of remedy in a school desegregation case involves factual complexities, the court of appeals' error—its failure to recognize the import of *Dayton I*, and its consequent failure to remand for the kind of factfinding *Dayton I* requires—is neither complicated to state nor difficult to correct. The Court has granted certiorari before to consider the fit between remedy and wrong in school desegregation cases, and the court of appeals' opinion suggests to us the appropriateness of revisiting that area now.

It is of course true that the question presented boils down to a question of who shall bear the cost. That question, however, is not a trifling one for the State, which will be required by the decision below to divert several hundred million dollars "from taxpayers or other competing programs (including other needy school districts) to the beneficiaries of this plan" (83-1721 Pet. App. 88a (Bowman, J., dissenting)). Our experience, both in this case and in other recent desegregation cases, suggests that racial hostility is gradually—and fortunately—diminishing as an obstacle to agreement, leaving allocation of a cost as a major, if not the most important, issue. And the allocation of costs inevitably affects the size and shape of the remedy itself, for litigants like the suburban districts here will have little hesitation in assenting to desirable programs, however unnecessary to re-

dress a prior constitutional violation, if they are not required to pay for them.

The question presented is also of importance to the United States. The St. Louis desegregation plan—particularly its reliance on voluntary measures—is in many respects a model that we would encourage others to follow, and we wish it to be a model of fairness to all concerned. While the United States is not directly affected in a monetary sense by the decisions below, the potential effect of those decisions therefore does concern us.[10]

Despite the importance of the question presented, we have some doubt whether the case warrants plenary review. If the Court agrees with us that further proceedings and factual findings are required in this case, the Court may wish to grant the State's petition (at least as to the first question presented therein),[11]

---

[10] The court of appeals earlier rejected plaintiffs' contentions that the United States, although nominally an amicus curiae and later a plaintiff-intervenor, had "contributed to the segregation of the St. Louis school district" and should be required "to pay a substantial portion of the cost of integrating [it]" (667 F.2d at 647, 653-654). Although no relief was decreed directly against the United States, the government did provide "a substantial portion of the funding" for desegregation in St. Louis (see 677 F.2d at 654) through the Emergency School Aid Act, 20 U.S.C. (Supp. V) 3191, for the 1980-1981 and 1981-1982 school years. And while the United States has vigorously resisted contentions that its housing and education programs should render it liable for segregation in the schools, the depth of the government's pockets make it a tempting target for litigants and courts seeking to solve intractable problems by agreeing that each shall get everything he wants and that someone else shall pay the bill. See *United States* v. *Chicago Board of Education*, 567 F. Supp. 272 (N.D. Ill.), aff'd in part, 717 F.2d 378 (7th Cir. 1983).

[11] We believe that the second and third questions presented in the State's petition, to the extent that they raise issues not

summarily vacate the decision below, and remand for further proceedings consistent with *Dayton I*. We believe that such disposition would not endanger the prospects for a prompt and fair settlement of this litigation, and we share Judge Bowman's hope that the parties would "resume their negotiations and achieve a settlement agreement to which all could assent" (83-1721 Pet. App. 94a). Alternatively, if the Court believes that the questions presented can be treated adequately only upon full briefing and oral argument, we would not oppose that course.

6. None of the questions presented in the other two petitions merits this Court's review. The City of St. Louis, petitioner in No. 83-1386, contends that the decision below places improper restrictions on the City Board's taxing prerogatives in connection with the latter's funding obligations under the desegregation decree. Although the district court's original funding order was problematic in this respect, we think that the court of appeals fully cured the problem. It held that the district court had erred in enjoining a scheduled property tax reduction (83-1721 Pet. App. 65a-66a) and ruled that future orders affecting the City Board's tax rate should be entered only if accompanied by factual findings demonstrating their necessity (*id.* at 66a). To prevent disruption of the school system's finances, the court of appeals, in the exercise of its equitable discretion, did allow the injunction to remain in place for the balance of the 1983-1984 school year (*id.* at 60a). But the question whether that discretion was properly exercised

---

previously considered by the Court in the State's earlier petitions for certiorari (see 80-2152 Pet. i, 81-2022 Pet. i, and pages 30-31, *supra*), are fairly comprised within the first question presented here.

does not merit this Court's review, particularly since the 1983-1984 school year is now over. Petitioners' challenges to the district court's authority to issue future orders affecting the City Board's tax rate (83-1386 Pet. 19-21) are premature.

The North St. Louis Parents, petitioners in No. 83-1838, are an association of black parents whose children attend public schools in North St. Louis. Their motion to intervene in the proceedings below was denied (83-1838 Pet. 3), but they filed written objections to the proposed settlement in the district court (*ibid.*). They contend that their objections were ignored (*id.* at 3-4). The district court noted that it had considered numerous oral presentations (83-1721 Pet. App. 113a-114a) and 42 written presentations (*id.* at 114a) from various individuals and groups supporting and opposing the settlement. It noted that it had "considered all statements presented by members of the public" and had concluded that "[t]he amount and type of opposition * * * [was] not overwhelming in the light of the scope and notoriety of this lawsuit" (*id.* at 114a, 115a). There is no reason to believe that the district court failed to consider petitioners' written comments.

CONCLUSION

The petitions in Nos. 83-1386 and 83-1838 should be denied. If the Court agrees with us that further proceedings and factual findings are required in this case, it may wish to grant the petition in No. 83-1721 (at least as to the first question presented therein, see pages 32-33 note 11, *supra*), summarily vacate the decision below, and remand for further proceedings consistent with *Dayton I*. Alternatively, if the Court believes that the case can be treated adequately only upon full briefing and oral argument, we would not oppose that course.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

JULY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421623 10016

Nos. 83-1386, 83-1721 and 83-1838

Supreme Court, U.S.
FILED
AUG 2 1984
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

OCTOBER TERM, 1983

RONALD A. LEGGETT, *et al.*,
STATE OF MISSOURI, *et al.*,
and
NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS I. ATKINS
NAACP
186 Remsen St.
Brooklyn, New York 11201
(212) 858-0800

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Law School Bldg., N.E.
Washington, D.C. 20064
(202) 832-8525

MICHAEL J. HOARE
CHACKES & HOARE
314 N. Broadway, Suite 1010
St. Louis, Missouri 63102
(314) 241-7961
Attorneys for Caldwell Plaintiffs

WILLIAM P. RUSSELL
408 Olive Street, Suite 715
St. Louis, Missouri 63102
(314) 621-4525
Attorney for Liddell Plaintiffs

JOHN H. LASHLY
PAUL B. RAVA
KENNETH C. BROSTRON
LASHLY, CARUTHERS, BAER & HAMEL
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2938

DAVID S. TATEL
ALLEN R. SNYDER *
ELLIOT M. MINCBERG
SUE A. KAPLAN
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Attorneys for the Board of Education of the City of St. Louis, Missouri

JOHN GIANOULAKIS
KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
411 North Seventh Street
St. Louis, Missouri 63101
(314) 241-3963
Attorneys for Ritenour and Pattonville School Districts

* Counsel of Record

[Additional attorneys listed on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DONALD J. STOHR
JAMES W. ERWIN
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676
Attorneys for Parkway School District

HENRY D. MENGHINI
ROBERT J. KREHBIEL
EVANS & DIXON
314 North Broadway, 16th Floor
St. Louis, Missouri 63102
(314) 621-7755
Attorneys for Affton and Lindbergh School Districts

ROBERT P. BAINE, JR.
BAINE & EDWARDS
225 South Meramec Avenue
St. Louis, Missouri 63105
(314) 862-5900
Attorneys for Hazelwood School District

BERTRAM W. TREMAYNE, JR.
TREMAYNE, LAY, CARR & BAUER
120 South Central, Suite 540
St. Louis, Missouri 63105
(314) 863-4151
Attorneys for Kirkwood and University City School Districts

EDWARD E. MURPHY, JR.
GARRY SELTZER
MURPHY & ASSOCIATES, P.C.
120 South Central, Suite 938
St. Louis, Missouri 63105
(314) 725-5440
Attorneys for Riverview Gardens School District

ROBERT G. MCCLINTOCK
705 Olive Street, Room 722
St. Louis, Missouri 63101
(314) 241-5673
Attorney for Ladue School District

GEORGE J. BUDE
ZIERCHER, HOCKER, HUMAN, MICHENFELDER & JONES
130 South Bemiston, Suite 405
St. Louis, Missouri 63105
(314) 727-5822
Attorneys for Hancock Place, Brentwood, Clayton, and Jennings School Districts

DAROLD E. CROTZER, JR.
STEINBERG & CROTZER
230 South Bemiston, Suite 1010
St. Louis, Missouri 63105
(314) 727-9400
Attorneys for Normandy School District

RICHARD H. ULRICH
SHIFRIN, TREIMAN, BARKEN, DEMPSEY & ULRICH
11 South Meramec, Suite 1350
St. Louis, Missouri 63105
(314) 862-3232
Attorneys for Maplewood-Richmond Heights School District

ALBERT M. SCHLUETER
KENNETH V. BYRNE
SCHLUETER & BYRNE
11 South Meramec, Suite 1400
St. Louis, Missouri 63105
(314) 727-0777
Attorneys for Valley Park School District

FRANK SUSMAN
NORMAN C. PARKER
SUSMAN, SCHERMER, RIMMEL & PARKER
7711 Carondelet, 10th Floor
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Ferguson-Florissant School District

BRUCE S. FELDACKER, P.C.
705 Olive Street, Suite 500
St. Louis, Missouri 63101
(314) 231-2970
Attorney for St. Louis Teachers Union, Local 420, American Federation of Teachers

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a court order pursuant to *Hills v. Gautreaux*, 425 U.S. 284 (1976), requiring the State to fund voluntary interdistrict transfers between the City and consenting suburban districts in order to help remedy the *de jure* segregated school system which the State has been found guilty of creating and helping to maintain in the City, presents an issue warranting review, particularly where the Court of Appeals has twice approved similar orders calling for the funding of such voluntary transfers and this Court has twice denied certiorari.

2. Whether a court order requiring the funding of compensatory education and other remedies in order to help eliminate the vestiges of a *de jure* segregated school system, based upon a detailed review of the particular facts in the record of this case and pursuant to this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977), presents an issue warranting review.

3. Whether an appellate court ruling which holds that a district court order deferring a tax rate decrease must be dissolved unless further proceedings demonstrate that such a deferral is the only way to fund a remedy for a constitutional violation presents an issue warranting review simply because the Court of Appeals continued the deferral in effect as an interim measure for the duration of the 1983-84 school year, in accord with this Court's prior decisions concerning interim remedies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	15
REASONS FOR DENYING THE WRIT	17
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Adams v. United States, 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980) 3, 4, 5, 19, 30
Allen v. State Board of Elections, 393 U.S. 544 (1969) 26
Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3756 (1984) 22
Berry v. School District of Benton Harbor, 698 F.2d 813 (6th Cir.), *cert. denied*, 104 S. Ct. 236 (1983) 22
Black v. Cutter Laboratories, 351 U.S. 292 (1956) 24
Brennan v. Armstrong, 433 U.S. 672 (1977) 23
Brown v. Board of Education, 347 U.S. 483 (1954) 30
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 22, 23, 24
Cooper v. Aaron, 358 U.S. 1 (1958) 30
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 23, 26
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 23, 24
Elrod v. Burns, 427 U.S. 347 (1976) 25
Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978) (*en banc*), *cert. denied*, 446 U.S. 923 (1980) 22, 27
Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) 24
Ford Motor Co. v. United States, 405 U.S. 562 (1972) 22
Graham v. Folsom, 200 U.S. 248 (1906) 25
Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) 16, 24, 25, 27
Hills v. Gautreaux, 425 U.S. 284 (1976) ..... i, 7, 16, 18
In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) 28
Keyes v. School District No. 1, 413 U.S. 189 (1973) 19
Lemon v. Kurtzman, 411 U.S. 192 (1973) 26

TABLE OF AUTHORITIES—Continued

	Page
Liddell v. Board of Education, 491 F.Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981)	5, 6
Liddell v. Board of Education, 677 F.2d 626 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982)	7, 9, 21, 28
Liddell v. State of Missouri, 717 F.2d 1180 (8th Cir. 1983)	27
Mahan v. Howell, 410 U.S. 315 (1973)	26
Milliken v. Bradley, 418 U.S. 717 (1974)	7, 15, 18
Milliken v. Bradley, 433 U.S. 267 (1977)	*passim*
Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)	25
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	26
Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969)	27
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	23
Supervisors v. Durant, 76 U.S. 415 (1869)	25
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	19, 22
United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) (*en banc*)	21
United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967)	23
United States v. Texas, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972)	23
United States v. Texas Education Agency, 679 F.2d 1104 (5th Cir. 1982)	22
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	25
Upham v. Seamon, 456 U.S. 37 (1982)	26
Virginia v. West Virginia, 246 U.S. 565 (1918)	25
Von Hoffman v. City of Quincy, 71 U.S. 535 (1867)	25
Watson v. City of Memphis, 373 U.S. 526 (1963)	29
Welsch v. Likens, 550 F.2d 1122 (8th Cir. 1977)	29

TABLE OF AUTHORITIES—Continued

Page

Yaris v. Special School District, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, No. 83-1865 (8th Cir. Feb. 24, 1984) 30

OTHER AUTHORITIES

Fed. R. Civ. P. 23(e) 9

Missouri Constitution

Article VI § 26(b) 12
Article IX § 1(a) 18
Article X § 11(c) 4, 12

Missouri Revised Statutes

§ 164.011 4
§ 164.013 12

Sup. Ct. R. 17.1(a) 17
Sup. Ct. R. 17.1(c) 17
St. Louis Post Dispatch, Sept. 14, 1983 p. 1 30

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1386, 83-1721 and 83-1838

RONALD A. LEGGETT, *et al.*,
STATE OF MISSOURI, *et al.*,

and

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners, the City of St. Louis and certain City officials (hereinafter "City"), the State of Missouri and certain State officials (hereinafter "State"), and the North St. Louis Parents and Citizens for Quality Education and certain members of that association (hereinafter "Association"), have asked this Court to grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit *en banc*, entered on February 8, 1984. The City and State Petitioners challenge the provisions for financing a settlement agreement entered into by black plaintiffs as class representatives, the Board of Education of the City of St. Louis, and all twenty-three St. Louis County school districts. The agreement was approved by the District Court on July 5, 1983. Acting on the basis of existing findings of liability against the State of Missouri and the City Board, the District Court also entered an order to fund the agreement. The Dis-

trict Court's order was approved with modifications by the Court of Appeals.[1] The voluntary desegregation plan embodied in the agreement has been operating successfully since September, 1983.

On three previous occasions, this Court has denied requests to review earlier decisions in this case raising most of the same issues which Petitioners present here. Because the decision below is correct and does not raise any questions warranting review by this Court, Respondents Craton Liddell, *et al.* (hereinafter "Liddell Respondents"), Respondents Earline Caldwell, *et al.* (hereinafter "Caldwell Respondents"), Respondents Board of Education of the City of St. Louis, Missouri, its members, officers, and administrators (hereinafter "City Board"), the St. Louis County school district Respondents listed herein, and Respondent St. Louis Teachers Union urge this Court to deny the pending petitions.

STATEMENT OF THE CASE

The "Statement of the Case" set forth in the State's petition implies that the courts below imposed on an innocent state government the obligation to fund a massive, mandatory cross-district busing order for the purpose of ensuring a better racial balance in a unitary school system. The City's petition further suggests that the courts below ordered a tax increase to help finance the plan.

In fact, however, the State is not innocent, the City schools are not unitary, the desegregation plan is not

---

[1] The Eighth Circuit's opinion is reported at 731 F.2d 1294 and is reprinted in Appendix ("City App.") K to the Petition for a Writ of Certiorari filed by the City ("City Pet.") and in Appendix ("State App.") A to the Petition for a Writ of Certiorari filed by the State ("State Pet."). The decision of the District Court which was reviewed by the Eighth Circuit is reported at 567 F. Supp. 1037 and is reprinted in City App. A and in State App. B. A supplemental order issued by the Eighth Circuit on March 5, 1984 is reported at 731 F.2d 1336 and is reprinted in Appendix B to the Supplemental Brief of the City.

mandatory, and no tax increase was ordered. What in fact happened below was that the State—which had been found liable after trial, along with the City Board, for creating, maintaining, and failing to dismantle a *de jure* racially dual school system in the City of St. Louis whose vestiges remain unliquidated today—was ordered to help fund a voluntary desegregation plan worked out between the City Board and all 23 surrounding St. Louis County school districts. The plan gives black students attending the remaining unconstitutionally segregated schools in the City a choice between volunteering to attend majority white schools in county districts or schools in the City that are free to the maximum extent practical from the vestiges of past discrimination. No child will be forced to be "bused" anywhere. Contrary to the impression left by the City, neither the Court of Appeals nor the District Court ordered the City Board or any other entity to increase the tax rate previously approved by the voters. Instead, both courts specifically held that no court-ordered tax increase would be proper unless and until it is proven essential to remedy unconstitutional segregation and its vestiges. These facts, along with the other relevant facts in this case, are set forth in more detail below.

The Establishment of State and City Board Liability for School Segregation in St. Louis

In 1980, the Eighth Circuit held that the State and the City Board had failed to discharge their constitutional duty to eliminate the vestiges of the pre-1954 *de jure* racially dual school system in the City of St. Louis. The court found that, as a consequence of the constitutional violation, 77% of the City schools remained more than 90% one-race. *Adams v. United States*, 620 F.2d 1277, 1285 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980). The court's ruling was based upon an extensive record compiled during lengthy litigation in the District Court, including over 7,000 pages of transcript and some 1,200 exhibits. Both the City Board and the

City of St. Louis, as well as the State, participated as parties in that trial. *Id.* at 1283 n.5.[2] The 23 St. Louis County school districts were not parties at that time. This Court denied a petition for a writ of certiorari. *Adams v. United States*, 449 U.S. 826 (1980).

The Court of Appeals' 1980 opinion specifically held that the State played a significant role in the creation and maintenance of segregation within the City of St. Louis. "Separate schools were maintained by the St. Louis Board of Education pursuant to [state] legislation and the state constitution." *Id.*, 620 F.2d at 1280. A series of state laws and constitutional provisions had created the "state-mandated segregated system," and a number of these provisions remained on the books after 1954, some as late as 1976. *Id.* at 1281, 1280. In addition, the court noted that "discriminatory restrictions against blacks were enforced by the courts and agencies of the State of Missouri" prior to 1954, which "intensified racial segregation" in St. Louis. *Id.* at 1291 n.21. The court held that after 1954, the State failed to take "prompt and effective steps" to dismantle the dual system, and the St. Louis City schools remained segregated. City App. K at p. A-408c.

The Eighth Circuit's 1980 opinion ordered the District Court to implement a "system-wide" remedy for the "system-wide" constitutional violation, including mandatory student reassignments. *Adams v. United States*,

---

[2] Prior to trial, the State was added as a defendant and the City was permitted to intervene as a separate party. Under Missouri law, respondent City Board is an independent, elected public body which has its own taxing authority and sets its own tax rate for school purposes, subject to numerous restrictions imposed by State law. *See* Mo. Rev. Stat. § 164.011; Mo. Const. art. X, § 11(c). Although the City of St. Louis shares boundaries, taxpayers, and constituents with the City Board, it is a separate political entity from the City Board and is separate both geographically and politically from St. Louis County. Once the City Board sets its tax rate, the City's role is limited to the ministerial function of collecting taxes on behalf of, and distributing revenues to, the City Board.

supra, 620 F.2d at 1291, 1295. The Court of Appeals recognized, however, that any feasible remedy limited to mandatory reassignment could not effectively desegregate the schools and remove the vestiges of the dual system. *Id.* at 1296. The court found that a so-called "racial balance" plan, which would have required virtually every St. Louis City school to mirror the racial composition of the system as a whole, was impractical in light of the District Court's finding that its probable result "would be an all-black school system in a few years." *Id.* at 1295. *Accord*, City App. K at p. A-416-417. At the same time, the court noted that under any of the available alternatives, some black St. Louis students would remain in one-race schools. *Id.* at 1296. The appellate court accordingly directed the trial judge to consider the use of other remedial techniques to provide relief to black St. Louis students, including the implementation of compensatory and remedial educational programs pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), and voluntary student exchanges with suburban school districts. *Adams v. United States*, *supra*, 620 F.2d at 1296-97.

The District Court's 1980 Findings and Order

On remand, the District Court conducted additional hearings, made supplemental findings, and issued a desegregation order based on a plan developed by the City Board effective for the 1980-81 school year. *Liddell v. Board of Education*, 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). Again, the State participated fully in these hearings. Among its other findings, the District Court specifically held that the State had previously "mandated school segregation," that it "never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy," and that it was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public

schools." *Id.* at 357, 359, 360.[3] The court accordingly ordered the State defendants and the City Board, which had been found to be "jointly and severally liable," each to pay part of the costs of the desegregation plan. *Id.* at 352-53, 357, 359.

In addition to some mandatory reassignment of pupils, the 1980 desegregation plan included magnet schools, improvements in the overall quality of education in the City schools, and the implementation of remedial and compensatory programs for students remaining in primarily one-race schools. *Id.* at 357. Pursuant to the Court of Appeals' mandate to consider techniques for providing additional relief to students remaining in segregated schools, the District Court's order also called for the development of a "voluntary, cooperative plan of pupil exchanges" between the City school district and the surrounding St. Louis County districts. *Id.* at 353 (paragraph 12(a)). The Eighth Circuit affirmed the District Court's order in all respects, and this Court denied certiorari. 454 U.S. 1081 (1981).

The Interdistrict Claims and the Further Implementation of the 1980 Order

In January, 1981, the Caldwell Respondents and the City Board filed motions to add suburban districts to the litigation and to bring claims for interdistrict remedies, and similar pleadings were subsequently filed by the Liddell Respondents. These claims contended that the county districts, in conjunction with the State, had created and perpetuated a racially dual, metropolitan-wide structure of public education justifying the implementation of a mandatory metropolitan desegregation remedy. *See* City App. A, p. A-42-44. These allegations were denied by the defendants.

---

[3] Despite these findings by the District Court and the 1980 holding of the Court of Appeals, the State continues to rely in this Court upon the earlier findings in the District Court's 1979 decision, which found neither the State nor the City Board liable for school segregation in St. Louis, even though that decision was *reversed* by the Court of Appeals. *See, e.g.*, State Pet. at 29 n.28.

While these interdistrict claims were pending, the District Court ordered further implementation of the relief it outlined in 1980 in order to continue the process of dismantling the vestiges of the racially dual school system remaining in the City of St. Louis. *See Liddell v. Board of Education*, 677 F.2d 626, 628 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982) (*"Liddell V"*) (noting that "30,000 black students still attend all-black schools" in St. Louis). This included an order that the State defendants pay transportation and related costs of a voluntary interdistrict transfer plan that had been developed pursuant to paragraph 12(a) of the 1980 order, under which black City students and white county students from districts which chose to take part could participate in voluntary interdistrict transfers. The State defendants protested, claiming that the order violated *Milliken v. Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*), and that sufficient findings of State liability had not been made. As in 1981, the Eighth Circuit rejected these arguments on the basis of the established liability of the State defendants for segregation within the City and on the authority of *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Liddell V*, 677 F.2d at 630.[4] As in 1981, this Court denied certiorari. 459 U.S. 877 (1982).

The Settlement Agreement

Shortly before trial of the interdistrict claims in February, 1983, the parties announced that, with the as-

---

[4] The Court of Appeals also held that the established liability of the State defendants and the City Board permitted the District Court to require them to take additional steps to "help eradicate the remaining vestiges of the government-imposed school segregation in city schools, including actions which may involve the voluntary participation of the suburban schools." *Id.* at 641. The court noted that such steps could include, for example, additional financial incentives for county districts to participate in voluntary interdistrict programs, more magnet schools to attract county students, and improvements in the quality of education in the remaining all-black City schools. *Id.* at 641-642. All of the foregoing elements were included in the Settlement Agreement approved below.

sistance of a court-appointed special master, an Agreement in Principle had been reached to settle the interdistrict claims against the 23 St. Louis County districts.[5] A proposed Settlement Agreement was filed on March 30, 1983, and was accepted by the three groups of plaintiffs in the interdistrict phase of the case—the City Board, Liddell and Caldwell Respondents—and by all 23 St. Louis County school districts.[6]

The Settlement Agreement is designed to provide further relief for black students attending one-race schools in the City of St. Louis. It contains desegregation measures that build upon the paragraph 12(a) voluntary interdistrict transfer plan and the 1980 desegregation order.[7] It also implements some specific steps which the Eighth Circuit suggested in its 1982 opinion were justified in view of the established liability of the State and

---

[5] The City asserts that it was "excluded" from the settlement negotiations. City Pet. at 3. There is no support in the record, however, for this claim, and the City never raised it below. Nor is there any indication that the court-appointed special master, under whose auspices the negotiations took place, would have rejected a request by the City to participate actively. In fact, several months before the case was settled, the City sought unsuccessfully to withdraw altogether from the case. *See* Order of December 29, 1982 [H(1870)82]; City App. A at p. A-10-11. The State also participated actively in the settlement negotiations, although it ultimately decided not to sign the Settlement Agreement. *See* Transcript of Fairness Hearing of May 13, 1983 at 6 (statement of Assistant Attorney General Marshall) (stating that State defendants' "input was of some assistance" in negotiations).

[6] At the time the Settlement Agreement was filed, St. Louis County also informed the District Court that, assuming the Agreement was acceptable to the county school districts, the county had "no objection that the Settlement Agreement as drafted be implemented according to its terms." *See* Position of St. Louis County Government Defendants Regarding Settlement Agreement [H(2239)83] (filed April 4, 1983) at 2. The county has now contradicted its previous position in its brief filed with this Court supporting the City's petition for a writ of certiorari.

[7] At the time of the Settlement Agreement, 15 of the 23 St. Louis County school districts were participating in the paragraph 12(a) voluntary plan.

the City Board. *Liddell V*, 677 F.2d at 641-42; *see* note 4, *supra*.

Contrary to the State's implication that the agreement required or "called for busing more than 15,000 students," State Pet. at 5, the agreement is completely voluntary and no student is required to participate. It is designed to give all black students attending one-race schools in the City a choice between transferring to predominantly white schools in the county districts or attending schools in the City in which the vestiges of segregation have been removed to the maximum extent practical by *Milliken II*-type ancillary relief. Like the paragraph 12(a) plan, the agreement provides for voluntary interdistrict transfers between City and county schools. Each county district which receives enough transfers within five years to satisfy specified desegregation goals will obtain a final judgment. To attract suburban students to the City, and to provide additional relief for black City students, the agreement creates additional magnet schools and general improvements in the quality of education in the City schools, similar to those contained in the 1980 desegregation order. As in the 1980 order, the agreement also provides for special educational improvements for black City students remaining in one-race schools. *See* City App. K, p. A-410.

The District Court's Order

The Settlement Agreement was conditional upon court approval pursuant to Fed. R. Civ. P. 23(e), and upon a court order requiring the parties previously found liable—the State and the City Board—to finance the plan in order to provide further desegregation relief. *See* Settlement Agreement [H(2217)83] at X (A), (B) (3), City App. C at p. A-125, 127. Beginning on April 28, 1983, the District Court conducted a five-day hearing concerning the fairness, reasonableness, and adequacy of the Settlement Agreement. This hearing also considered the extent to which the State and the City Board could be ordered to fund the Settlement Agreement on the basis of

their proven liability for intradistrict segregation. Extensive evidence was presented at the hearing concerning the importance of the compensatory and remedial educational programs and other components of the plan to the achievement of successful desegregation.[8] In addition to oral testimony, the court received 42 written statements from interested persons, proposed findings from the parties, and public statements from community leaders and groups. These included favorable statements concerning the plan issued by the presidents of St. Louis colleges and universities, numerous area religious leaders, both United States Senators from Missouri, and a number of education and civic groups.[9] The State and the City presented evidence seeking to attack the proposed financing of the plan and claiming that the relief to be ordered against

---

[8] *See, e.g.*, Transcript of April 28, 1983 Fairness Hearing ("April 28 Tr.") at 1-40 (testimony of Dr. James DeClue); *id.* at 1-70-80, 83-85 (testimony of Dr. Robert Dentler); *id.* at 1-135-140 (testimony of Dr. Jerome Jones); May 13 Tr. at 44-46, 54 (testimony of Dr. Evelyn Luckey). Dr. Dentler testified that the plan would have been "flawed beyond hope" without such compensatory and remedial educational programs. April 28 Tr. at 80. The State itself agreed that two specific programs, the "early childhood program" and the "instructional management system," had been "advocated" by its own Department of Elementary and Secondary Education and "should rightfully be part of this quality education package." May 13 Tr. at 9 (statement of Assistant Attorney General Marshall). In addition, the District Court had previously received testimony concerning the importance of such programs during earlier phases of the case, including from witnesses proffered by the State defendants. *See, e.g.*, Transcript of March 1, 1982 12(c) hearing ("March 1 12(c) Tr.") at 23-24, 40-41 (testimony of former St. Louis School Supt. Robert Wentz); *id.* at 113 and March 3 12(c) Tr. at 145 (testimony of Dr. Gordon Foster); March 2 12(c) Tr. at 18-19 (testimony of Dr. Robert Dentler); *id.* at 160, 172-173 (testimony of Dr. Albert Walker, witness for the State); March 24 12(c) Tr. at 52 (testimony of Dr. Herbert J. Walberg, witness for the State); *id.* at 128-129 (testimony of Dr. Gary Orfield).

[9] *See* Joint Response of City Board, Caldwell and Liddell Plaintiffs to Comments from the Public [H(2281)83] (filed April 11, 1983) at 2-4 and App. A-G; April 28 Tr. at 1-37-38; May 13 Tr. at 60-61; H(2539)83 (filed July 27, 1983).

the State was not warranted by the liability proven.[10] In addition, the Association presented written and oral objections concerning the adequacy of the plan's compensatory and remedial educational provisions and the allegedly disparate impact of the plan on some class members.[11]

In its order of July 5, 1983, the District Court approved the Settlement Agreement for implementation beginning in September, 1983. On the basis of the prior finding of intradistrict liability, the court also ordered the State defendants and the City Board to finance the plan, explicitly stating that the "sole purpose for the expenditure of funds under this Plan is to carry out the constitutional responsibility to remove the vestiges of [the] segregated school system" in the City of St. Louis which they had created and perpetuated, and that "all proposed expenditures must be justified on this basis." City App. A, p. A-33. The July 5 order provided that the State defendants would be responsible for the costs of voluntary interdistrict transfers, magnet schools, and certain part-time and alternative integrative programs, plus one-half the cost of the compensatory and remedial programs in the City schools and capital improvements pursuant to the plan. *See* City App. A, p. A-2-3.

In its July 5 order, the District Court held that the City Board was required to fund the other half of the costs of the compensatory and remedial programs and capital improvement components of the plan. *Id.* Evidence was presented that the City Board would be unable both to maintain its regular educational programs and to comply with its desegregation responsibilities unless additional revenues were made available.[12] The court

---

[10] *See, e.g.*, May 13 Tr. at 8-9 (statement of Assistant Attorney General Marshall); *id.* at 94-95 (testimony of George Otte, witness for the City); May 16 Tr. at 165 (testimony of Otis Baker, witness for the State).

[11] *See* April 29 Tr. at 3-20-31.

[12] *See* April 28 Tr. at 140-141, 144-145, 147 (testimony of St. Louis School Supt. Jones). State law severely limits the City

thus ordered the City Board to defer a reduction in its operating tax levy which had been scheduled as a result of the passage of Proposition C (Mo. Rev. Stat. § 164.013) insofar as necessary to meet the City Board's desegregation obligations. *See* City App. A, p. A-4. The court's order thus maintained—not increased—the existing tax rate in the City. The court indicated it would consider an appropriate order to raise additional revenue, but only if proven necessary. *See* City App. A, p. A-35.

The Court of Appeals' Opinion

In an *en banc* decision, the Eighth Circuit affirmed the District Court's July 5 Order with substantial modifications. Based upon the previous findings of liability and its earlier decisions, the appellate court upheld the District Court's ruling that the State defendants and the City Board could be ordered to fund the plan to desegregate further the City schools. *See* City App. K, p. A-407-408. The Eighth Circuit approved the July 5 Order with respect to voluntary interdistrict transfers between the City and the county districts, magnet schools in the City, compensatory and remedial educational programs for one-race schools, and the extension of such programs to the target City schools which became integrated as a result of the 1980 order insofar as necessary to achieve the quality of educational programs required for successful desegregation.

The court declined to approve the District Court's order that the State defendants fund magnet schools in county districts or transfers between one county district and another. It also declined to approve the District Court's order that compensatory and remedial educational

---

Board's ability to raise revenues. It requires approval by two-thirds of the City's voters for the issuance of bonds or any tax increase significantly above the current level. *See* Mo. Const. art. VI, § 26(b); art. X, § 11(c). Indeed, as recently as June 5, 1984, a majority of City voters approved a proposed tax rate increase and bond issue to help fund the desegregation plan, but these proposals failed because they did not receive the two-thirds vote required under State law.

programs be extended to the target City schools which became integrated as a result of the 1980 order where the record did not adequately support the need for such programs to remedy the existing constitutional violation. The appellate court thus effectively eliminated all or part of 13 such programs.[13] Finally, the court held that, although evidence had been presented concerning the need for additional City Board revenues to finance the plan, the lower court had not made a specific factual finding that there were no adequate fiscal alternatives to deferring the property tax reduction. Accordingly, the Eighth Circuit ordered that the reduction take effect in 1984-85 unless such findings are made. City App. K at p. A-455.

Recognizing that its opinion would require modification of the agreement and a reduction in the cost of the plan, the Eighth Circuit required the parties to decide promptly if they wished to continue to participate in the agreement. *See* City App. K, p. A-408a. All parties did agree to continue with the plan. *See* Order of March 28, 1984 [H(3000)84]. Despite the claims of the State and the City (*see, e.g.*, City Pet. at 19, State Pet. at 2), the fiscal year 1984 cost of the plan, even if the compensatory and remedial components and other programs approved by the District Court were implemented in full, was budgeted for $33.4 million. The City Board has

---

[13] *Id.* at p. A-407-408, 443-445; City Board's Status Report on its Compliance with the Eighth Circuit's Instructions Pertaining to Quality Education Programs Under Settlement Plan and Request for Reductions in State Payments for 1983-84 [H(3022)84] (filed April 2, 1984) at 4, 6, Attachment 3. Examples of programs which were cut or eliminated for targeted integrated schools include: curriculum supervision; lowering of certain pupil/teacher ratios; and provision of additional counselors for integrated elementary schools. *Id.* In addition, the Court of Appeals imposed cost and related limitations on new part-time integrative programs, the total number of interdistrict transfers, compensatory programs in all-black schools, and capital improvements. The court also required review of proposed future expenditures by a five-person budget committee on which the State is to have two representatives. *See* City App. K, p. A-434, 442-443, 446-447, 458.

recently estimated that the cost will actually be less than $27.4 million, of which less than $18.7 million is to be paid by the State.[14] The State itself has recently stated in the court below that based upon the Court of Appeals' opinion, its "settlement plan budget for fiscal year 1984 should be on the order of $10.5 million." [15]

Experience Under the Settlement Agreement

While these court proceedings have been pending, the 1983-84 school year began in the City of St. Louis and in St. Louis County. As the Court of Appeals noted, 2,294 black students from the City have been voluntarily

---

[14] *See* Amended Settlement Plan Budget of City Board [H(2878)84] (filed Feb. 1, 1984) at 3-4; City Board's Status Report on its Compliance with the Eighth Circuit's Instructions Pertaining to Quality Education Programs under Settlement Plan and Request for Reduction in State Payments for 1983-84 [H(3022)84] (filed April 2, 1984) at 7, Attachments 1, 2, and 4. The Budget Review Committee recently has recommended (over the City Board's objection) that the State's share be further reduced to approximately $10.9 million. Budget Review Committee Report on Disputes Concerning 1983-84 Settlement Plan Funding Obligation [H(3150)84] (filed June 13, 1984) at 9. The City Board's estimate and the Budget Review Committee's recommendation do not include costs associated with interdistrict transfers. Those costs will depend upon the precise number of transfer students. Prior to the Court of Appeals' opinion limiting such transfers, the costs were estimated by the signatories to the plan to be about $7.2 million. *See* Settlement Plan Summary of Costs (filed with Eighth Circuit Court of Appeals on September 28, 1983). Although no final 1984-85 budget has yet been determined, costs will be somewhat higher next year, in part because one-time start-up and renovation expenditures will be required then for certain magnet school and other programs. *See* Order of July 12, 1984 [H(3220)84]. Such costs are subject to the budget control procedure established below. Hearings on the 1984-85 budget were underway at the time of the filing of this Brief. *See* note 13, *supra*.

[15] State Appellants' Response to Caldwell Plaintiffs' Motion for Attorneys' Fees and Costs (8th Cir., filed April 30, 1984) at 5. *See also* Second Quarterly Progress Report on the Settlement Plan—Financial Advisor's Report [H(3071)84] (April 23, 1984) ("Second Quarterly Report") at 6 (court-appointed financial advisor reporting that "[a]ll data indicate that even recent revised budget appropriations will be underspent this year").

attending predominantly white schools in the county under the plan.[16] Another 389 white county students have voluntarily transferred to City schools. *See* City App. K, p. A-414. An additional 4,167 students have applied for City to county transfers for the 1984-1985 school year, and another 466 students have applied for county to City transfers for the same year. *See* Letters from the Executive Director of the Voluntary Inter-district Coordinating Council [H(3256)84] (dated July 18, 1984) and [H(3289)84] (dated July 25, 1984).[17] The Council which helps operate the plan, has reported to the District Court that the program shows every sign of success. "From both the students' as well as the receiving districts' perspectives, indications are that student adjustment has been excellent, programs are being coordinated to meet student needs, and that both student and staff attitudes are positive and receptive." Letter from Executive Director of the Voluntary Inter-district Coordinating Council [H(2729)83] (dated October 7, 1983). Desegregated education is now becoming a reality for the children of the City of St. Louis.

SUMMARY OF ARGUMENT

The primary arguments raised by Petitioners simply restate claims raised unsuccessfully by the State on prior occasions in this Court and the courts below, claims which this Court has repeatedly declined to review. Contary to the assertion of the City and State Petitioners, the decision below does not impose a mandatory metropolitan remedy in violation of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*). The only mandatory relief ordered was to require the State and the City Board,

---

[16] The 15,000 transfer figure contained in the State's Petition at 5 refers to the total number of transfers projected to be reached by the fifth year of the plan.

[17] Early experience under the Settlement Agreement demonstrates that the percentage of white students in the City school system is increasing, reversing a long downward trend. *See* Seventh Report of the City Board [H(2760)83] (filed October 31, 1983) at 40.

both adjudicated constitutional violators in connection with system-wide segregation in the City of St. Louis, to provide financing for further desegregation relief for City students, in cooperation with county districts which have voluntarily agreed to participate pursuant to the Settlement Agreement. This is fully consistent with *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), because only parties found liable have been compelled to participate, and because the remedy ordered by the District Court is intended to alleviate the remaining vestiges of the dual system in the City of St. Louis for which the State defendants and the City Board have been found responsible. It is also consistent with *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*), because the Court of Appeals specifically found that the remedies it approved were tailored to the nature and scope of the proven violation: the confinement of black students to inferior quality one-race City schools. The Court of Appeals has properly applied the relevant legal principles to the particular facts in St. Louis.

In addition, the City's petition claims repeatedly that the courts below have somehow engaged in improper judicial levying of taxes to finance the further desegregation relief ordered in St. Louis. This allegation reflects a fundamental misinterpretation of applicable law and of the decisions below. Neither the Court of Appeals nor the District Court ordered the City Board or any other entity to raise its tax rate. Instead, both courts specifically held, pursuant to *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), that no court-ordered increase would be proper unless and until it is proven essential to remedy unconstitutional segregation and its vestiges. While the District Court had ordered the deferral of a scheduled property tax reduction based on evidence that continuation of the present tax rate was necessary to help finance desegregation, the Court of Appeals held that this order must be dissolved unless the District Court makes further explicit findings that such funding is absolutely necessary for effective desegrega-

tion and that no alternative source of funding exists. The Court of Appeals properly allowed the order to remain in force through the end of the 1983-84 school year as an interim measure in order to avoid disruption in mid-year, as this Court has done in numerous school desegregation and other cases.

Petitioners have thus failed to show that the decision of the Eighth Circuit in this case conflicts with any decision of another Court of Appeals or of this Court. *See* Supreme Court Rule 17.1(a), (c). On the contrary, the court's opinion reflects the application of established principles of law to the particular facts of this case, and does not present any issues of general applicability worthy of review by this Court.

REASONS FOR DENYING THE WRIT

1. Both the City and the State claim that the decision below "implemented a metropolitan remedy, based on findings that proven violations affected only a single school district." City Pet. at 19. *Accord*, State Pet. at i. This claim echoes the virtually identical arguments unsuccessfully raised by the State in prior arguments to this Court and the courts below. *See* p. 7, *supra*.[18] It also reflects a fundamental misunderstanding of the District Court's order.

Relief was ordered below only against the State and the City Board. Both remain obligated to dismantle the dual system in the City of St. Louis for which they have been found liable. Precisely as with the earlier voluntary

---

[18] *See* State's Petition for a Writ of Certiorari in No. 80-7152 (filed June 17, 1981) at 20 (claiming that the "District Court exceeded its authority in ordering the preparation of a plan of voluntary exchanges between the St. Louis School District and nonparty school districts" based on "an intradistrict violation"); State's Petition for a Writ of Certiorari in No. 81-2022 (filed April 30, 1982) at 7 (claiming that lower courts approved "an inter-district remedy without first finding an inter-district violation"). *See also* City App. K at p. A-417-419 (discussing previous unsuccessful State attempts in this Court and the Court of Appeals to attack orders requiring State to fund voluntary interdistrict transfers).

interdistrict 12(a) plan, which the State attacked unsuccessfully in the Court of Appeals and in this Court, the District Court ordered the State and the City Board to help finance and implement a voluntary plan involving the cooperation of suburban districts in order to further remedy school segregation in the City. Indeed, the District Court's order was essentially an expanded version of the previous voluntary plan. Contrary to Petitioners' suggestions, the District Court expressly stated that it was ordering this relief for the "sole purpose" of fulfilling the "constitutional responsibility to remove the vestiges of a segregated school system." City App. A, p. A-33.

As the District Court and the Court of Appeals recognized, this Court's decisions in *Milliken I* and *Hills v. Gautreaux*, *supra*, fully support this order. Unlike *Milliken I*, no relief was ordered against suburban jurisdictions that have not been found liable. *See Milliken I* at 721-722. Instead, as in *Gautreaux*, constitutional violators were required to implement a plan extending beyond the boundaries of a city in order to help relieve segregation found to have been caused by them within the city. *Id.*, 425 U.S. at 297-300 (affirming order requiring Department of Housing and Urban Development ("HUD") and Chicago Housing Authority ("CHA") to implement a plan which extended beyond the City of Chicago, but which did not require suburbs to participate, in order to help remedy housing segregation caused by HUD and CHA within the city). As in *Gautreaux*, the fact that the wrong committed by the State was within the city does not prevent the courts from ordering relief involving the voluntary cooperation of suburban districts.[19]

---

[19] The State's attempt to distinguish *Gautreaux* is unconvincing. HUD and CHA were both found liable for segregated housing violations within the Chicago city limits, just as the State of Missouri and the City Board were found liable for segregated schools within the City of St. Louis. Just as HUD had authority to act beyond the geographical limits of the City of Chicago, the State of Missouri has state-wide responsibility for establishing and maintaining public schools throughout the State. Mo. Const. art. IX § 1(a). Just

The State nevertheless argues that the relief ordered below is improper. Without citing anything in the record, the State asserts that the "numerous . . . one-race schools" in the City of St. Louis may be the result of "a racial distribution caused by personal choices regarding housing or employment or other factors not attributable to proven unconstitutional conduct by the State." State Pet. at 20. This claim is nothing more than a warmed-over version of defendants' previous argument, which was specifically rejected by the Court of Appeals in 1980, that school segregation in the City of St. Louis was caused by factors over which defendants "had no control," such as "discriminatory private policies" and "general population movements unrelated to any specific governmental policies." *Adams v. United States, supra*, 620 F.2d at 1291. Both the Court of Appeals and the District Court found in 1980 that the remaining segregation and one-race schools in the City of St. Louis were a vestige of the *de jure* segregated system and other unconstitutional conduct of the State and the City Board. This Court denied certiorari. *See* City App. K at p. A-408c-408d; p. 3-6, *supra*.[20] The State's attempt to re-

---

as it was appropriate for HUD to be ordered to construct public housing outside the Chicago city limits with the consent of suburban governmental entities in order to help remedy segregated conditions in the city for which HUD was liable, it is appropriate in this case to require the State of Missouri to fund voluntary interdistrict transfers outside the City of St. Louis with the consent of St. Louis County school districts in order to help remedy segregated conditions in the City for which the State is liable.

[20] These rulings are consistent with this Court's decision in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18, 26 (1971) ("*Swann*"), where this Court held that the existence of one-race schools establishes a "*prima facie* case of violation of substantive constitutional rights," and that defendants have the burden to establish that such schools are "not the result of present or past discriminatory action." The State's speculation in its petition concerning other possible causes of one-race schools in St. Louis clearly fails to satisfy its burden under *Swann*. *See also Keyes v. School District No. 1*, 413 U.S. 189, 207-213 (1973) (explaining the burden on defendants of justifying the existence of remaining one-race schools).

litigate in this Court this settled factual question does not raise an issue worthy of review.

2. The City, State, and the United States also maintain, as the State has previously argued to this Court, that the remedies ordered below, particularly the compensatory and remedial programs for City schools ordered pursuant to *Milliken II*, exceeded the scope of the constitutional violation proven. Petitioners and the United States have misread the decision below and the relevant case law.

As this Court has explained, a desegregation remedy "does not 'exceed' the violation" where it is "tailored to cure the '*condition* that offends the Constitution' "—in this case, the vestiges of *de jure* system-wide school segregation in the City of St. Louis. *Milliken II*, 433 U.S. at 282 (emphasis in original). The Court of Appeals acknowledged and adhered to this principle. It reviewed applicable legal precedents regarding the need for such components in order to overcome "the inequalities inherent in dual school systems," beginning with this Court's holding in *Milliken II*. City App. K, p. A-436, 437-38. Based on the extensive evidence presented to the District Court (*see* p. 9-11, *supra*), the Court of Appeals then proceeded to analyze carefully each aspect of the relief ordered. *See* City App. K, p. A-420-448. The appellate court approved only those components which the record demonstrated were necessary to correct the vestiges of the former dual system, namely the remaining one-race, inferior schools in the City. The order below gives each of the 30,000 students attending those schools the choice of attending a magnet school, a regular City school improved by *Milliken II* programs, or an integrated school in a county school district. *See* City App. K, p. A-445, A-460. The Court of Appeals reversed the District Court as to all programs which did not meet this exacting standard, such as student transfers between county districts, county magnet schools, and all or part of 13 components of the compensatory and remedial portion of the plan. *Id.* at A-407; *see* p. 12-13 *supra*. This procedure

conforms precisely to the standards established by this Court. Petitioners and the United States offer no basis for asking this Court to review the Court of Appeals' detailed application of the *Milliken II* standards to the facts of this case.

Contrary to the State's assertion, it is no "curious accident" that the Court of Appeals found that the programs included in the Settlement Agreement as modified (as distinguished from the broader remedies sought in the interdistrict complaints), were tailored to remedy the remaining vestiges of the constitutional violation. *See* State Pet. at 26. *See also* Brief for the United States at 23. The parties who negotiated the settlement were keenly aware that they were drafting a plan that had to be sufficiently tailored to the existing intradistrict liability findings to warrant a court order requiring their funding and implementation. For this reason, they drafted the compensatory and remedial education provisions in accordance with similar provisions in the 1980 order. *See* p. 8, *supra.* The parties also expressly relied upon the 1982 Court of Appeals opinion suggesting the types of additional desegregation relief that could be ordered against the State and the City Board based upon the existing record. *See Liddell V*, 677 F.2d at 641-642, cited at Settlement Agreement [H(2217)83] at X (B)(3), City App. C at p. A-127. Contrary to the argument presented by Petitioners and by the United States, it is thus clear that the remedy has been carefully tailored to the existing intradistrict violation.[21]

---

[21] The State further asserts, relying on *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (*en banc*), that since it is not a consenting party to the Settlement Agreement, the Court may not "approve ramming a settlement" down its throat. State Pet. at 15 n.13. The decision in *City of Miami*, however, is irrelevant to this case. There the court declined to approve that portion of a settlement agreement that affected the rights of a non-consenting third party. In *City of Miami*, unlike this case, there was never any finding of liability on the part of the third party. In contrast, the court here properly ordered the State to fund the Settlement Agreement based on the established findings of State liability for the unconstitutional conditions that the order seeks to remedy.

Petitioners' cramped view of the appropriate nature of desegregation remedies squarely contradicts this Court's prior holdings. This Court has charged state and local authorities with the responsibility to take "whatever steps might be necessary" to eliminate "all vestiges of state-imposed segregation" from the schools. *Swann*, 402 U.S. at 15; *accord*, *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979) (*"Columbus"*). When such authorities fail to do so, the courts are not limited—as Petitioners assert—to a fanciful and futile effort to try to recreate "things as they would have been." State Pet. at 19. *See also* City Pet. at 22. As this Court has explained, it is not possible simply "to turn back the clock." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972). Instead, so long as the objective is to "cure the condition that offends the Constitution," the "scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken II*, 433 U.S. at 281, 282 (approving remedial reading and other compensatory programs despite argument that "the court's decree must be limited to" student reassignments since "the constitutional violation found" was "the segregation of students on the basis of race").[22] Following the example of this Court's decision in *Milliken II* and numerous other appellate court holdings, the court below properly ordered the use of compensatory programs and other relief to remedy the vestiges of the unconstitutional *de jure* segregated system in St. Louis.[23]

---

[22] *Accord*, *Swann*, 402 U.S. at 15. This Court has recognized the same principle in other types of cases involving equitable relief. *E.g.*, *Ford Motor Co.*, 405 U.S. at 573 n.8 (explaining that equitable decrees in antitrust cases should seek to "*cure the ill effects* of the illegal conduct" and are not limited to "restoration of the *status quo ante*") (emphasis in original).

[23] *See, e.g.*, *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3756 (1984); *Berry v. School Dist. of Benton Harbor*, 698 F.2d 813 (6th Cir.), *cert. denied*, 104 S. Ct. 236 (1983); *United States v. Texas Educ. Agency*, 679 F.2d 1104 (5th Cir. 1982); *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (*en banc*),

The reliance of Petitioners and of the United States on this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), to contradict these holdings is misplaced. In *Dayton I*, this Court held that the district court had improperly ordered a system-wide remedy where the violation proven had "included at most a few high schools." *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 540-541 (1979) ("*Dayton II*"). As this Court made clear in *Columbus*, the holding in *Dayton I* is limited to situations where "only a few apparently isolated discriminatory practices had been found," making a systemwide remedy inappropriate. *Columbus*, 443 U.S. at 465-466.[24] In this case, as in *Columbus* and *Milliken II*, the State and the City Board are responsible for systemwide, *de jure* segregation in the City of St. Louis, and the remedy was designed to redress the effect of "[t]he 'condition' offending the constitution." *Milliken II*, 433 U.S. at 282. The ruling in *Dayton I*, where this Court held that it was necessary to define and seek to remedy the incremental effects of specific identifiable constitutional violations, is simply inapplicable.[25] Thus, the findings below met the

---

cert. denied, 446 U.S. 923 (1980); *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

As the Court of Appeals recognized, Petitioners' heavy reliance on *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), is misplaced. Where, as here, a case involves "a suspect class (race) and an established constitutional violation (a *de jure* school system)," the courts have "repeatedly endorsed compensatory and remedial efforts to overcome educational inadequacies caused by segregated schools, *Rodriguez* notwithstanding." City App. K, p. A-440 n.7.

[24] Unlike the decisions relied upon by the State, this case involves the vestiges of a state-mandated *de jure* segregated school system, not individual "findings of segregative acts" warranting only limited relief. *Compare Brennan v. Armstrong*, 433 U.S. 672 (1977) (cited at State Pet. at 19).

[25] *Dayton I* similarly does not justify remand to the District Court for additional findings. As discussed at p. 12-13, 20-21,

standards set forth in *Dayton II*, *Milliken II* and *Columbus* and, in any event under well-established legal principles, the adequacy of those findings does not present a question worthy of this Court's review.

3. The City's claim that the courts below have engaged in "judicial taxation," City Pet. at 10, misconstrues the decisions below. The District Court merely stated that, after future hearings, it would consider as a matter of last resort authorizing a property tax increase in St. Louis if proven essential to ensure adequate funds for desegregation, and the court expressly reserved for a later date the question of whether such an order would be necessary. City App. A, p. A-35. In deference to the applicable principles of comity and federalism, the Court of Appeals also made it clear that such an order would be permissible under *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), only "after exploration of every other fiscal alternative." City App. K, p. A-449. Accordingly, there is no present controversy concerning the propriety of such an order, and any ruling by this Court concerning that issue would be purely advisory.[26] The City's challenge to the validity

---

supra, the Court of Appeals reviewed in detail each aspect of the relief ordered and made specific findings concerning the remedies it upheld. Contrary to the argument presented by the United States, there was no impropriety in the appellate court's making such factual findings based upon the trial record. Indeed, the findings made by the Court of Appeals in this case were even more detailed than the appellate court findings relied upon by this Court in upholding the system-wide remedy in *Dayton II*. *Id.*, 443 U.S. at 540-541. The United States' suggestion that the Court summarily vacate the decision below and remand for additional findings is simply unrealistic. Such an order would completely and unnecessarily disrupt the voluntary desegregation plan now in effect and would fatally undermine the Settlement Agreement so carefully negotiated among the parties.

[26] This Court has made it clear that it does not issue advisory opinions on hypothetical questions. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 735 (1978). *Accord, e.g., Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (noting that this Court "reviews judgments, not statements in opinions").

of a hypothetical future order which may or may not require the raising of additional tax revenues does not warrant review by this Court.[27]

The only action below relating to tax revenues was the decision by the District Court ordering the maintenance of the current St. Louis school tax rate and deferring a scheduled property tax rate reduction to the extent "necessary to fund [the] City Board's constitutional obligation." City App. A, p. A-4. This order was based on testimony that the City Board would be unable to maintain its regular educational programs and to comply with its desegregation responsibilities if the tax rate were reduced. *See* p. 11-12, *supra*. Although the Court of Appeals recognized that the record in fact reflected such financial

---

[27] The City's contention that federal courts may never order taxes to be levied or spent contradicts squarely the previous holdings of this Court. In *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918), this Court held that the existence of the judicial power to resolve a controversy necessarily implies the existence of the power to "enforce the results of its exertion," including, if necessary, a writ of mandamus directing the legislative body to enact and levy a tax to satisfy the judgment. Numerous other decisions of this Court, including *Griffin*, have recognized the federal court's authority to order municipalities to raise and expend tax revenues where necessary to vindicate constitutional rights or fulfill contractual obligations. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 681 (1978) (acknowledging long line of cases in which this Court has "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . ordering that taxes be levied and collected to discharge federal-court judgments once a constitutional infraction was found"). *Accord, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Graham v. Folsom*, 200 U.S. 248 (1906); *Supervisors v. Durant*, 76 U.S. 415 (1869); *Von Hoffman v. City of Quincy*, 71 U.S. 535 (1867). This Court's recognition of the power of federal courts to remedy constitutional violations, including the ultimate power to raise taxes if necessary, is in accord with long-established common law doctrines. *See* cases cited at City App. K, p. A-449-454. Furthermore, the City's reliance on the doctrine of separation of powers is misplaced. As this Court has held, separation of powers "has no applicability to the federal judiciary's relationship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (Brennan, J., announcing the judgment of the Court). *Accord, Virginia v. West Virginia, supra*, 246 U.S. at 591.

problems, it held that the District Court should have made an explicit finding that all other fiscal alternatives were insufficient before deferring the rollback. City App. K, p. A-455. Accordingly, the appellate court ruled that the District Court must allow the rollback to take effect in 1984-85 unless such findings are made. *Id.*

Petitioners nevertheless complain because the appellate court in February did not reverse the rollback suspension retroactively to the beginning of the 1983-84 school year. The Court of Appeals, however, was simply applying this Court's consistent holdings that once any legal error has been corrected on appeal, interim measures are permissible in order to avoid disruption even where not consistent with the proper legal result reached on appeal.[28] This principle has been applied by this Court to school desegregation cases as well, including the decision in *Dayton I* relied upon by Petitioners. In that case, even though this Court held that the evidence and findings were inadequate to support the system-wide remedy ordered by the lower courts, the Court approved the continuation of the remedy for the pending and next succeeding school years. *Id.* at 421. Indeed, the appellate court here took a more conservative approach than in *Dayton*, since it held that the deferral may continue only for the remainder of the 1983-84 school year and must

---

[28] *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (staying judgment invalidating Bankruptcy Reform Act in order to avoid "impairing the interim administration of the bankruptcy laws"); *Lemon v. Kurtzman*, 411 U.S. 192, 194 (1973) (holding that district court could permit state to reimburse non-public school for educational services performed prior to decision declaring such payments unconstitutional); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (permitting use of erroneously ordered reapportionment plan as "interim plan" for next succeeding election); *Mahan v. Howell*, 410 U.S. 315, 332-333 (1973) (upholding interim remedy by district court in voting rights case using multi-member districts which would not have been appropriate as final relief); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-572 (1969) (refusing to apply voting rights decision retroactively to set aside previous elections conducted in violation of applicable law).

end before the school year beginning in September, 1984, unless specific findings justifying its continuation are made.

Thus, the Court of Appeals announced no new principle concerning federal court authority over state and local taxation. Instead, in accordance with its previously expressed concern about avoiding disruption of the desegregation plan in mid-year, it simply left the rollback deferral in place until the end of the school year in June 1984 in order to avoid such disruption.[29] The Court of Appeals' treatment of the rollback deferral issue under the particular circumstances of this case accords with the standards established by this Court and raises no issue warranting review.[30]

---

[29] *See Liddell v. State of Missouri*, 717 F.2d 1180, 1183 (8th Cir. 1983) (*"Liddell VI"*) (explaining that issuance of a stay after school year had begun would "necessitate reassigning students and teachers . . . and revising administrative decisions concerning budgeting, orientation and hiring," thereby disrupting "the lives of thousands of students and teachers"). *Accord*, App. B to Supplemental Brief of City Petitioners at A-3 (supplemental opinion of Court of Appeals of March 5, 1984) (describing the "consistent view" of the court "that we will avoid disruption during the school year whenever possible").

[30] In addition to failing to demonstrate that the decision below concerning the tax and rollback issues departs from the decisions of this Court, the City has failed to show any conflict among the circuits. *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969) (cited in City Pet. at 15, 23), did not even involve a tax levy. Instead, it concerned an order requiring a school district to seek funds under federal programs, and it was premised on the recognition that adequate funding for desegregation would be forthcoming pursuant to an injunction against the County Commission, which was upheld by the appellate court. *Id.* at 834. In *Evans v. Buchanan*, 582 F.2d 750, 780 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980) (cited in City Pet. at 11, 17, 23, 25, 29), the Third Circuit specifically endorsed the principle of *Griffin v. County School Bd.*, *supra*, that a court has authority to enter a tax order where necessary to protect a desegregation decree, such as where "substantially insufficient funds" are provided to operate a school system. Like the Eighth Circuit below, it remanded to the district

4. Petitioner Association claims that the courts below erred in approving the Settlement Agreement because the agreement allegedly favors the interests of black students who choose to transfer to county schools over the interests of those who choose to remain in City schools. Petitioner further contends that the District Court's alleged failure to give sufficient consideration to Petitioner's objections to the plan amounts to a denial of due process. These arguments were thoroughly addressed by the Eighth Circuit and do not raise any issues worthy of this Court's attention.

Petitioner's arguments totally ignore the fact that the Settlement Agreement provides for a wholly voluntary plan. The option of transferring to suburban districts is offered on an equal basis to *all* black students attending majority-black City schools. *See* Settlement Agreement [H(2217)83] at II(B), City App. C, p. A-69-70. The Settlement Agreement also contains substantial remedial and compensatory relief designed to improve conditions for those students who choose to remain in City schools—relief that was ordered below in order to further remedy established constitutional violations. *See* p. 9, 12, 19-23, *supra*.[31]

Thus, the Eighth Circuit concluded that there was "no evidence in the record to support the claim that the interests of students attending all-black schools are being slighted," since they will now be able either to "attend their neighborhood school, attended an integrated school in the city or county, or attend a magnet school." City

---

court because it had not made factual findings sufficient to justify contravening the tax rate approved by the legislature.

[31] Petitioner's reliance on *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), is thus misplaced. That case involved a proposed settlement in which plaintiff class members who declined to accept a cash settlement would have had their federal claims dismissed even though they received no relief in return. In contrast, in this case, substantial relief is provided to students who do not elect to transfer out of City schools.

App. K, p. A-460. The Eighth Circuit similarly rejected Petitioner's argument that due process was denied because the District Court allegedly failed to respond in detail to Petitioner's objections to the settlement plan. After careful review, the court held that the District Court's lengthy opinion "reveals that it engaged in a reasoned examination of objections raised by class members concerning whether the plan is fair, reasonable and adequate." City App. K, p. A-461 (*citing Liddell v. Board of Education*, *supra*, 567 F. Supp. at 1042-1047). Petitioner Association has failed to demonstrate that its attempt to relitigate these holdings warrants review by this Court.

5. Finally, the State claims that the decision below "wrongfully interferes with decisions about State programs" and impedes the interest of State authorities in "managing their own affairs," because it involves the expenditure of State funds which could be used for other purposes. State Pet. at 28, 30. Not surprisingly, the State can point to no decision of this Court or a federal court of appeals which supports its assertion that such budgetary or management factors are more important than the constitutional rights of thousands of schoolchildren.

The State's argument necessarily assumes that there are some federal constitutional violations which, for budgetary reasons, the courts are powerless to remedy. That is not and cannot be the law. As this Court has recognized, "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963).[32] In *Milliken II*, this Court rejected vir-

---

[32] *Accord, e.g., Welsch v. Likens*, 550 F.2d 1122, 1132 (8th Cir. 1977) (holding that the "obligation [to comply with constitutional standards] may not be permitted to yield to financial considerations"). Like the State of Michigan in *Milliken II*, the State in this case is free to determine how to finance its responsibilities under the order below. For example, the State could utilize some of its

tually the identical argument raised by the State here: it explained that a "federal court judgment enforcing the express prohibitions on unlawful State conduct" under the Fourteenth Amendment "does not jeopardize the integrity of the structure or functions of state and local government," regardless of its costs. *Milliken II*, 433 U.S. at 291.

The total lack of merit in the State's argument that it should not be ordered to fund the remedy here becomes even clearer when put into historical perspective. Until the middle of the nineteenth century, the State of Missouri outlawed the teaching of black children altogether. For almost one hundred years thereafter, the State required that blacks be educated only in segregated schools. *See Adams v. United States, supra*, 620 F.2d at 1280-81. Even after *Brown v. Board of Education*, 347 U.S. 483 (1954), the State took no effective action to dismantle the racially dual system in the City of St. Louis. *See* City App. K at p. A-408c. Even today, thirty years later, approximately half the City's students remain in one-race schools. The State cannot now claim that it has no responsibility to remedy these conditions. *Compare Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Nor can it avoid its responsibility simply by complaining about the costs. The State's unsupported attempt to resurrect such long-discredited arguments fails to present an issue worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

$2.4 billion of general, unearmarked funds for fiscal year 1984 or, as Governor Bond proposed, raise new tax revenues. *See* May 17 Tr. at 22 (testimony of State Budget Director Perry McGinnis); *St. Louis Post Dispatch*, Sept. 14, 1983, at 1. *See also Yaris v. Special School Dist.*, 558 F. Supp. 545, 559 n.7 (E.D. Mo. 1983), *aff'd*, No. 83-1865 (8th Cir. Feb. 24, 1984) (noting that "only one state in the country appropriates less funds than the State of Missouri for its educational system").

Respectfully submitted,

THOMAS I. ATKINS
NAACP
186 Remsen St.
Brooklyn, New York 11201
(212) 858-0800

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Law School Bldg., N.E.
Washington, D.C. 20064
(202) 832-8525

MICHAEL J. HOARE
CHACKES & HOARE
314 N. Broadway, Suite 1010
St. Louis, Missouri 63102
(314) 241-7961

Attorneys for Caldwell Plaintiffs

WILLIAM P. RUSSELL
408 Olive Street, Suite 715
St. Louis, Missouri 63102
(314) 621-4525

Attorney for Liddell Plaintiffs

DONALD J. STOHR
JAMES W. ERWIN
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Attorneys for Parkway School District

HENRY D. MENGHINI
ROBERT J. KREHBIEL
EVANS & DIXON
314 North Broadway, 16th Floor
St. Louis, Missouri 63102
(314) 621-7755

Attorneys for Affton and Lindbergh School Districts

* Counsel of Record

JOHN H. LASHLY
PAUL B. RAVA
KENNETH C. BROSTRON
LASHLY, CARUTHERS, BAER & HAMEL
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2938

DAVID S. TATEL
ALLEN R. SNYDER *
ELLIOT M. MINCBERG
SUE A. KAPLAN
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for the Board of Education of the City of St. Louis, Missouri

JOHN GIANOULAKIS
KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
411 North Seventh Street
St. Louis, Missouri 63101
(314) 241-3963

Attorneys for Ritenour and Pattonville School Districts

GEORGE J. BUDE
ZIERCHER, HOCKER, HUMAN, MICHENFELDER & JONES
130 South Bemiston, Suite 405
St. Louis, Missouri 63105
(314) 727-5822

Attorneys for Hancock Place, Brentwood, Clayton, and Jennings School Districts

DAROLD E. CROTZER, JR.
STEINBERG & CROTZER
230 South Bemiston, Suite 1010
St. Louis, Missouri 63105
(314) 727-9400

Attorneys for Normandy School District

ROBERT P. BAINE, JR.
BAINE & EDWARDS
225 South Meramec Avenue
St. Louis, Missouri 63105
(314) 862-5900
Attorneys for Hazelwood School District

BERTRAM W. TREMAYNE, JR.
TREMAYNE, LAY, CARR & BAUER
120 South Central, Suite 540
St. Louis, Missouri 63105
(314) 863-4151
Attorneys for Kirkwood and University City School Districts

EDWARD E. MURPHY, JR.
GARRY SELTZER
MURPHY & ASSOCIATES, P.C.
120 South Central, Suite 938
St. Louis, Missouri 63105
(314) 725-5440
Attorneys for Riverview Gardens School District

ROBERT G. MCCLINTOCK
705 Olive Street, Room 722
St. Louis, Missouri 63101
(314) 241-5673
Attorney for Ladue School District

RICHARD H. ULRICH
SHIFRIN, TREIMAN, BARKEN, DEMPSEY & ULRICH
11 South Meramec, Suite 1350
St. Louis, Missouri 63105
(314) 862-3232
Attorneys for Maplewood-Richmond Heights School District

ALBERT M. SCHLUETER
KENNETH V. BYRNE
SCHLUETER & BYRNE
11 South Meramec, Suite 1400
St. Louis, Missouri 63105
(314) 727-0777
Attorneys for Valley Park School District

FRANK SUSMAN
NORMAN C. PARKER
SUSMAN, SCHERMER, RIMMEL & PARKER
7711 Carondelet, 10th Floor
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Ferguson-Florissant School District

BRUCE S. FELDACKER, P.C.
705 Olive Street, Suite 500
St. Louis, Missouri 63101
(314) 231-2970
Attorney for St. Louis Teachers Union, Local 420, American Federation of Teachers

Office - Supreme Court, U S
FILED
AUG 2 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1721, 83-1386, 83-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MISSOURI, et al.,
Petitioners,

vs.

CRATON LIDDELL, et al.,

and

EARLINE CALDWELL, et al.,

and

JANICE ADAMS, et al.,

and

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al.,

and

THE CITY OF ST. LOUIS, MISSOURI,

and

THE UNITED STATES OF AMERICA,
Respondents.

SUPPLEMENTAL BRIEF FOR LIDDELL RESPONDENTS IN OPPOSITION

JOSEPH S. McDUFFIE and
WILLIAM P. RUSSELL*
408 Olive Street, Suite 206
St. Louis, Missouri 63102
(314) 621-4525
Attorneys for Liddell Respondents

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES. . . . . ii.iii

TABLE OF APPENDIXES. . . . . iv.

OPINIONS BELOW. . . . . 2.

JURISDICITION. . . . . 2.

STATEMENT OF THE CASE. 2-11

QUESTIONS PRESENTED. 12-15

DISCUSSION. 16-31

CONCLUSIONS. 32

TABLE OF AUTHORITIES

CASES CITED:

LiddellI, Liddell vs. Caldwell, 546 F.2d. 768 (1976), cert. denied, 433 U.S. 914 (1976). . .

Reversing

LIddell II, Liddell vs. Caldwell, 553 F.2d.557 (1977), Procedural orders. . . . . .

Liddell vs. Bd. of Ed.m 469 F.Supp. 1304 (1974); Reversed by Adams vs. U.S., 620 F.2d. 1277, cert. denied, 449 U.S. 826 (1980). . . . . .

Liddell vs. Bd. of Ed., 491 F.Supp. 351 (1980), Affirmed. . . . . .

Liddell III, Liddell vs. Bd. of Ed., 667 F.2d 643, cert. denied, 454 U.S. 1091 (1981). . . . .

Liddell IV, Liddell vs. Bd. of Ed., (District Court), 567 F.Supp. 1037 (1983)

Liddell VI, vs. Missouri, 717 F.2d. 1180, (1983). .

State ex rel vs. Holmes, 231 S.W.2d., 185, 191, (1950). . . . . .

Morrilton, et al., vs. United States, 606 F.2d. 222, 230, (1979). . . . . .

State vs. Andrae, 116 S.W. 561 ( ). . . . . .

Richardson vs. Dolan, 181 S.W. 2d. 997 (1944). . .

Shelley vs. Kraener, 355 Mo. 814, 198 S.W.2d. 679 (Mo. en banc 1946); reversed 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 1161 (1947). . . . .

Jones vs. Alfred H. Mayer Co., 255 F.Supp. 115 (E.D. Mo. 1966); aff'd 379 F.2d. 33 (8th Cir. 1967); reversed 392 U.S. 409, 88 S.Ct. 2186, 20 L. Ed.2d. 1189 (1968). . . . . .

Milliken vs. Bradley I, 418 U.S. 717 (1974). . .

Hills vs. Gautraeux, 425 U.S. 284 (1976). . . . .

Milliken vs. Bradley II, 433 U.S. 267, 280-281 (1977). . . . . .

Hobby vs. Disman, 250 S.W.2d 137, 141 (Mo. (1952).,

Dayton Bd. of Ed. vs. Brinkman, 433 U.S. 406 (1977)

School Dist. of Omaha vs. U.S., 433 U.S. 667 (1977). . . . . .

STATUTES:

28 U.S.C. 1254 (1). . . . . .

14 Amendment U.S. Constitution. . . . . .

Missouri Constitution, Article IX, Sections 1, 2(a), (b). . . . . .

162.571 et. seq., City of St. Louis Metro School District. . . . . .

Chapter 162, R.S.Mo. 1968-Mo School District Statute. . . . . .

TABLE OF APPENDIXES

L.R. App. A - Excerpts from original Petition of Liddell Plaintiffs; Paragraphs 4, 6, 7, 8, 9, 10, 15, 16, 17, 18 (last clause, Pg. 9), 19 and 20.

L.R. App. B - District Court's Order of July 13, 1977, on the Scope of Post Consent Decree hearing.

L.R. App. C - Post Hearing (469 F. Supp.) "Suggested Findings of Fact, etc." "Findings of Fact": Paragraphs 1, 2, 3 and 4 - Accompanying Brief: 1st full Paragraph, Pg. 3.

L.R. App. D - The June 3, 1980 Findings of Fact and Conclusions of Law of the District Court (491 F. Supp.); Facts: Paragraphs 5, 12, 14 and 17 - Law: Paragraph 5, Pg. 9 and Paragraph 6, Pg. 10 and Paragraph 7, Pg. 11.

L.R. App. E - Excerpts - Testimony of Dr. William Kottmeyer on Neighborhood School Concepts of St. Louis Public Schools; Questions and Answers: Pgs. 8, 9, and 10.

L.R. App. F - The June, 1954 Policy Statement, City School Board adopting Neighborhood Schools; Pgs. 1086, 1087, 1088 of Minutes.

L.R. App. G - Liddell Plaintiffs' Suggested Findings: Pg. 8, Paragraph 28 and concluding on Pg. 9. Conclusions: Pg. 34, Paragraph b. 469 F. Supp. - Findings of Facts: Pgs. 10, 11, 13, 28, 41 and 107.

L.R. App. H - Liddell Plaintiffs' Supplemental Pleadings and Memorandum in Support Thereof: H(1027)82.

L.R. App. I - R.S.Mo. 162.571 et seq. St. Louis City Metropolitan School District.

L.R. App. J - Excerpts from State Defendants' Brief" as Requested by Court "in its letter of May 5, 1980".

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1721-83-1386-83-1838

STATE OF MISSOURI, ET AL.,

PETITIONERS,

VS.

CRATON LIDDELL, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR CRATON LIDDELL, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, was filed February 8, 1984 as slip opinion No. 83-2140. The opinion is reprinted as Appendix A in the separate Appendix of Petitioner's Application. The opinion of the District Court is reported at 567 F.Supp. 1030. It is also reprinted as Appendix B in the separate appendix of Petitioner's Application.

JURISDICTION

The judgment of the Court of Appeals en banc was entered on February 8, 1984. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents herein, Craton Liddell, by his next friend, Minnie Liddell; JoAnna Goldsby, by her next friend, Barbara Goldsby; Deborah Yarber, by her next friend, Samuel Yarber; Nathalie Moore, by her next friend, Louise Moore, and Rachelle LeGrand, by her next friend, Lois LeGrand; members of the Con-

cerned Parents, an unincorporated association, filed this suit on behalf of themselves and all other school age children and their parents, who were similarly situated in the City of St. Louis, Missouri - February 18, 1972.

An attempt was made to settle this litigation in 1975 by the filing of a consent decree. This move was resisted by the intervention of the NAACP. This phase of the litigation is set forth in Liddell vs. Caldwell (Liddell I), 546 F.2d. 768 (1976), cert. denied, 433 U.S. 914 (1976). The NAACP representing the Caldwell plaintiffs were permitted to intervene as a class of plaintiffs. The District Court permitted the City of St. Louis and other parent groups to intervene as plaintiff - Intervenors.

Under date of July 13, 1977, the State of Missouri, the State Commissioner of Education and the State Board of Education were joined as defendants by order of Judge James H. Meredith of the District Court.

The District Court ruled in its July 13, 1977

Order that all parties (intervenors and new defendants alike) are bound by the original pleadings the same as if they were original parties. Thus, if there are allegations in the original petition making a complaint against the State of Missouri and its agents School districts then the State of Missouri as a defendant is bound by those pleadings. The State's contention that no claim has been made against it would indicate that the State never read the original petition, or the plaintiff's Supplemental Pleadings. It would appear that a tactical decision "backfired" against the State.

These Respondents (the Liddell Plaintiffs) state that the original petition pleaded a cause of action against the State of Missouri and its agents. 1/ The State of Missouri filed in its pleading an admission of proper party, but denied responsibility for segregation in the City of St. Louis school system. The District Court was of the opinion that the Constitutional liability of defendant City Board of Education, et al. had not been determined

or admitted. Therefore, the District Court informed all parties that the schedule hearings would determine the constitutional liability of all defendants, including the State defendants. This was necessary because of three recent Supreme Court decisions, to wit: (all decided in 1977) Dayton Bd. of Ed. vs. Brinkman, 433 U.S. 406 (1977) Milliken vs. Bradley, 433 U.S. 267 (1977) School Dist. of Omaha vs. U.S., 667, (1977).

1/ Respondents alleged in their petition among other (L.R. App. A), "that the laws of Missouri vested the Board of Education of the City of St. Louis with general and supervising control and management of Public schools. . .Plaintiff further state that defendants, the Board of Education of the City of St. Louis and its individual members, the Superintendent and Acting Superintendent of Schools of said Board, and the District Superintendent of the districts within the Metropolitan school district of the City of St. Louis in the exercise of the functions of the state which have been delegated to them by the laws of Missouri, are required to conduct and superintend the business relating to the public schools of the City of St. Louis in a manner consistent with the requirements of the Constitution and laws of the United States, and to implement the legitimate public policy of the State of Missouri to provide, furnish, and make available equal raciallly non-segregated, racially non-discriminatory educational opportunities for all regardless of race, creed natural origin, color or sex, and to eliminate and prohibit segregated or separate schools or school

In deciding to hold a trial on the merits:

the courts said in its July 13, 1977 order:

"In the light of recent Supreme Court cases: Milliken vs. Bradley, No. 76-447, decided June 27, 1977; Dayton Board of Education vs. Brinkman, No. 76-539, decided June 27, 1977; and School District of Omaha v. United States, No. 76-705, decided June 29, 1977, it is necessary for this Court to determine if there has been a constitutional violation by the defendants.

This determination has never been made by the consent decree nor the stipulation of facts, and the stipulation of facts denies any constitutional violation by defendants.

1/ (Footnote continued)

districts on the basis of race, creed, or color; that the said defendants are further obligated to report and recommend to the legislative body of the state or of the city remedies to rid the system of the observed imperfections in the operation of the schools in their district; and that the said defendants are proper parties defendants to this action.

"That defendants and their predecessors in office in the exercise of the delegated educational functions of the State of Missouri have engaged in acts, practices, customs and usages which have had the natural, probable, foreseeable, and actual effect of incorporating into the public schools and the public school system of the metropolitan district of the City of st. Louis, the public and private residential racial segregation and discrimination practices of the State of Missouri and of the City of St. Louis in violation of the right of plaintiffs not to be segregated

All parties are bound by the stipulation of facts and the consent decree. The remedy to be adopted by the Court will depend on the nature and extent of the constitutional violation, if any. These matters willbe considered by the Court at the July 25, 1977, hearing in light of the evidence introduced and the briefs of the parties."

After a 37 day trial over 6 months, the District Court found:

1. That prior to 1954 the constitution of Missouri mandated separate schools for black and white pupils.

2. This provision remained in the constitution until 1976.

3. The State Board of Education has always had constitutional and statutory authority (among other things) to supervise educational instruction.

1/ (Footnote continued)

on the basis of race in public schools and the school districts established and maintained by defendant in the metropolitan school district of the City of St. Louis."

"Plaintiffs further states that for years prior to 1954, the State of Missouri, through its constitution and laws, the customs, policies, and practices of its instrumentalities, including but not limited to, its school districts, mandated and enforced both public and private racial segregation, including, but not limited to, public

4. The State determined Educational Policies.

5. The State of Missouri and the City of St. Louis School District had fulfilled their obligations to creat a unitary school system in

---

1/ (Footnote continued)

school education, the effects of which persist in the affairs of defendants in administering the public school system of the metropolitan district of the City of St. Louis, all of which had and continues to have the purpose and effect of denying equal educational opportunities and equal opportunities based on education, to black citizens and students by compelling the attendance of black students in segregated schools, and which denies to plaintiffs and the class on whose behalf they sue, the equal protection of the laws guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

"That defendants and their predecessors in office since 1954, pursuant to a policy, practice, custom and usage of racial discrimination denying Fourteenth Amendment rights, have by the devices, inter alia, of separate and racially discriminatory curriculum within the schools and school districts, frequent redistricting of school boundaries and school district boundaries, new school locations and construction, the assignment of all children to schools within the metropolitan district of the City of St. Louis, and the assignment of teachers in the school system, have acted affirmatively to create, support, maintain and continue to support and maintain a dual biracial school system in the Metropolitan School District of the City of St. Louis which denies to black children equal education opportunities; and that defendants have failed to

1955 and 1956 by the adoption of the Neighborhood School Policy in the City of St. Louis school system. Liddell v. Board of Education, City of St. Louis, et al., 469 F. Supp. 1304 (E.D. Mo. 1979); See also App. C-State's Suggested Finding of Facts and Conclusions of Law; Adams vs. U.S. 620 F 2d. 1277 (8th Circuit) en banc, cert. denied, 449 U.S. 826 (1980).

1/ (Footnote continued)

fulfill their affirmative duty to establish and maintian unitary public schools."

On appeal, the Court of Appeals reversed the District Court and held that under the circumstances of this case, the District Court erroneously held that the establishment of a neighborhood attendance policy fulfilled the defendants' "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Adams v. United States, 620, F. 2d., 277 (8th Circuit), 1980, cert. denied, 101 Sup. Ct., 88, 1980.

The Court of Appeals directed that segregation in the elementary and secondary schools in St. Louis must now be eliminated, and instructed the District Court to take necessary steps to bring about an integrated system. The City of St. Louis School Board prepared a plan for desegregating the public schools of the district. However, because of the ratio of black and white students in the system, the plan left 30,000 black students in predominantly black or all black schools in the North St. Louis area of

of the school district.

The District Court and the Eighth Circuit Court of Appeals approved the City Board's plan to desegregate the school system with Paragraphs 12a, 12b, 12c and 12d which specifically addressed the 30,000 black pupils remaining in segregated schools in North St. Louis: 12a being a voluntary plan of transferring students to County schools, 12b merged the vocational educational schools of City and County, 12c called for a mandatory plan of desegregation and 12d called for a study to determine the effects of housing on school desegregation.

Under state law, school districts are delegate agents of the state for the purpose of carrying out the state function of providing a gratutious education for its citizens, ages six to twenty-one.2/

2/ Missouri Constitution Article IX, §(a): "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratutious instruction of all persons in

QUESTIONS PRESENTED

The State of Missouri, in seeking this Court's Writ of Certiorari to the Eighth Circuit Court of Appeals, argues generally:

1. "This case involves an unprecendented order." Pet. P. 10

2. "The remedy is intolerable." Pet. P. 11

2/ (Footnote continued)

this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children except in cases otherwise provided for by law."

Missouri Constitution Article IX, §2(a): "The supervision of instruction in public schools shall be vested in a state board of education, consisting of eight (8) lay members appointed by the governor, by and with the advice and consent of the senate. . ." and in §2(b) it is provided: "The board shall select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state, and removable at its discretion. . ."

In State ex rel vs. Holmes, 231 S.W. 2d 185, 191 (1950), the Court made these pertinent statements: "Art. IX, Sec 1 of our Constitution says that "the general assembly shall establish and maintain free public schools for the gratutious instruction of all persons in this state within ages not in excess of twenty-one years," but it does not require the General Assembly to divide the state into school districts. The manner of their formation is not regulated by the Constitution.

3. The "quality education and rebuilding program flies in the face of holdings that the Constitution does not guarantee a right to public education at all, much less a right to "develop to the limits of (each student's) ability". . . . or to attend AAA schools." Pet. PP. 11-12.

2/ (Footnote continued)

"The fixing of boundaries of school district is a local affair which may be left to the will of the people under a general law providing for the creation of school districts throughout the state." Consolidated School District No. 41 v. Dacus., 189 Okl. 400, 117 P. 2d 508, loc. cit. 510. "No one would contend that the Legislature itself act directly in defining and changing the boundaries of each district in the state, without delegating this to local authorities. . . . . ." State ex rel. School District v. Andrae, 216, Mo. 617, loc. cit. 631, 116 S.W. 561, 564.

"The Legislature has always, as a matter of policy, left to the resident voters the settlement of all questions involving the organization of school districts. The local voters act to determine such questions either through the mode of petitioned elections or by petitions to the appropriate public official or officials clothed by law with the power to annex or detach territory. The resident voters of the particular territory are the delegated agents of the Legislature to administer the enabling leglislation, thereby implementing the leglislative intent to obey the constitutional mandate of insuring the establishment and maintenance of free public schools for the

Footnote continued on page 16

The State then argues specifically:

1. The Order was imposed without proper findings. Pet. P. 12

2. The remedy is unrelated to any provended violation, Pet. P. 16, because it provided for:

a. A Multidistrict Remedy. Pet. P. 16

b. Unauthorized Quality Education and Rebuilding Program. Pet. P. 24

3. The Order wrongfully interfered with decisions about State Programs. Pet. P. 28

At page 16 of the States' Petition for Certiorari, the State proclaims: "There is not dispute over the duty to eliminate the segregation of students within the St. Louis School District. What the States does dispute, and what is at issue here, is the duty to go beyond the district to achieve a racial balance unavailable within the district itself." Continuing on page 17, the State says: "Our position, simply put, is that the federal courts cannot require the State to transport students among districts in order to achieve a racial balance unavailable within the district

where the violation occurred." (Emphasis added).

We would change the emphasized phrase (racial balance) to read "remedy". With some modification of the issue as put by the State, the Liddell Plaintiffs state the question as follows:

Whether this complained of court order calling for additional relief outside the boundaries of the convicted City of St. Louis school district based on the unavailability of that relief within the City district and the voluntary transfer of students between segregated (all black) schools within the convicted City School District and predominantly white suburban school districts, said transfers to be paid for by the convicted State of Missouri as a primary Constitutional wrongdoer is supported on the record (including the decisions and judgments of the lower federal courts) and therefore ought not to be further reviewed by this Court.

BEST AVAILABLE COPY

DISCUSSION

The complained of Court order calling for Additional Relief Outside the Boundaries of the Convicted City of St. Louis School District Based on the Unavailability of that Relief within the City District and the Voluntary Transfer of Students between Segregated (All Black) schools within the Convicted City School District and Predominantly White Suburban School Districts,

---

2/ (Footnote continued)

gratutious instruction of all persons in this state within ages not in excess of twenty-one years. People v. Deatherage, 401 Ill. 25, 81 N.E.2d. 581."

"We hold that S.B. 307 is not an illegal delegation of legislative power within the meaning of Art. II of the Constitution. The county boards of education who devise the plans for reorganization, the State Board of Education a constitutional body who must approve the plans and the voters of the district are delegated agents of the Legislature to administer this act. This act is not such an exclusive legislative function as may not be delegated to the State Board of Education county boards of education and the voters of the proposed district. Wheeler School District v. Hawley, supra; Gardner v. Ginther, supra; School District v. Callahan, supra. "This is not deemed or considered a prohibited delegation of legislative powers." State ex rel. School District v. Andrae, supra, 216 Mo. loc. cit. 630, 116 S.W. loc. cit. 564."

said transfers to be paid for by the convicted State of Missouri as a primary constitutional wrongdoer, is supported on the record (including the decisions and Judgments of the lower Federal Courts) and therefore ought not to be further reveiwed by this Court.

The Liddell plaintiffs submit that the record, Judgments and decisions of the lower federal courts in this action support the relief approved against the State by the Eighth Circuit Court of Appeals and no further review by this Court is required. In support thereof, the Liddell plaintiffs state as follows:

1. The findings and conclusions of the District Court are supported by the original pleadings and the evidence, and are not contested by the State. Liddell, et al., vs. St. Louis Bd. of Education etc., 491 F. Supp. 454 (1980). See App. A- Original Petition; Appendix E, Testimony of Dr. Kottmeyer and App. G- original District Court findings on neighborhood schools; and 1st Suggested Findings and Conclusions on

Restrictive Covenants.

2. The Findings, Conclusions, and Judgments of the District Court have been consistently confirmed by the Eighth Circuit Court of Appeals. Liddell III, 667 F. 2d. 643 (8th 1981), cert. denied, 454 U.S. 1091 (1982) and Liddell IV, 693 F. 2d. 721 (1981) and Liddell V, 677 F. 2d. (1982) cert. denied, 103 Supreme Court, 172 (1982).

3. The United States Supreme Court has refused certiorari on the question of relief and funding of that relief as presented by the State on at least two prior occasions. Mo. vs. Liddell, 454 U.S. 1091 (1980); Mo. vs. Liddell, 103 S. Ct. 172 (1982).

The Liddell plaintiffs submit that this settlement agreement is based on their supplemental pleadings H(1027)82 for additional relief, by which they adopt all favorable findings, conclusions, opinions and judgments of the District Court and Court of Appeals, and therefore no further review is required. See APP. H-Liddell Plaintiff Supp. Pleadings H(1027)82.

These plaintiffs acknowledge that the Supreme Court has the authority to correct basic errors in the application of federal constitutional law and the proclamation of the law of the case doctrine is not a barrier to this court. We do not believe there is error or injustice in holding that the State of Missouri is a primary constitutional wrondoer and therefore amenable to interdistrict relief under the doctrine of Hills vs. Gautreaux, 425 U.S. 284 (1976).

The State of Missouri and those parties aligned with it err when they ignore the original pleadings and the findings and conclusions of the District Court in 491 F. Supp. 454 (1980) even though they do not contest those findings. The District Court in 1979, after the first hearing, erroneously held in 469 F. Supp., "that resort by the City Board to a neighborhood school policy after the decision in Brown, had eliminated segregation in the City schools, "Liddell vs. Bd. of Education, 469 F. Supp. 1304 (1979); Pet. A2 However, the above quotation is consistent with

the District Court's finding that the St. Louis City Board adopted the neighborhood school policy of student assignment, at least in theory.

The Eighth Circuit, en banc, reversed and held that the neighborhood school policy had little or no effect on pre-Brown segregation or the dual school system in the City of St. Louis; and based how the neighborhoods had been constructed, the policy would reinforce segregated schools, rather than eliminate them. Adams vs. U.S., 620 F. 2d. 1277, 1287, 1291, (1980).

Further, the State in its argument ignores the illegal judicial State policy enforced by defendant State of Missouri and its officers that made the illegal neighborhoods possible. These policies included the enforcement of illegal racial restricted covenants made unenforceable by this Court in Shelley vs. Kraemer, and made illegal by this Court in Jones vs. Mayer. See Fourteenth Amendment to the U.S. Constitution, Shelley vs. Kraemer, 68 Sup. Ct. 836 (1947); Jones vs. Mayer, 88 Sup. Ct. 2186 (1968). See also Richardson vs. Dolan, 181 S.W.

2d. 997 (1944) and cases cited therein.

The State further ignores prior approval of the so-called 12(a) voluntary plan which included suburban school district. That 12(a) plan is a part of the same District Court Judgment that is responsible for this broadened voluntary settlement agreement which was initiated in lieu of the madatory paragraph 12(c) of the Judgment. Liddell vs. Board of Education, 491 F. Supp. 351 (1980), affirmed by the Eighth Circuit Court of Appeals at 667 F. 2d. 643 (1981), cert. denied by this Court at 454 U.S. 1081, 1091 (1982).

In the State's petition for a writ where certiorari was denied in 454 U.S. 1081 the State expressly argued:

> "V. The District Court exceeded its Authrity and Violated Due Process in Paragraph 12(c) of its May 21, 1980 Order in which it Required the Submission of". . .a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation

in the City of St. Louis and St. Louis COunty

"Because, to date, this Litigation has not been Interdistrict in Scope and as a Result no Evidence has been Introduced Which Would even Remotely Call for Submission of Such a Plan."

This Court denied certiorari to the Eighth Circuit Appeals Court. The State had argued the distinctions in the application of Hills vs. Gautreaux and Milliken vs. Bradley (I) cases on interdistrict remedies, and the affirmative duty requirement of Green in State of Mo. vs. Liddell, et al., 103 S. Ct. 172 (1982).

Further, the State's current application for a Writ ignores the fact that this settlement agreement is based on the continuing jurisdiction of the District Court for further relief and on all favorable findings, conclusions, opinions and judgments of the District Court and of the Eighth Circuit Court of Appeals in the original cause of action as expressed in the Liddell Plaintiff's original petition and the Liddell

Plaintiffs' Supplemental Pleadings. See Appendixes A and H.

We submit that the State's erroneous perception of the whole lawsuit is expressed in the following quotation from page 6 of its Petition:

> "Rather, the Court undertook only to decide
>
> "Whether (the) proposed Settlement Plan is fair, reasonable, and adequate for the resolution of the 12(c) interdistrict phase of the case." Pet. App. 103a

The above quotation from the State's Petition is a part of the opening sentence of the District Court's Memorandum opinion and is misquoted out of context to support the State's cause. The District Court at page 108 of its opinion states elements of its considerations for satisfying the requirements of Federal Rule of Civil Procedure 23(d). Pet. App. B (108a).

These plaintiffs disagree with the District Court's decission of this Agreement as the settlement of an independent lawsuit to determine the liability of all defendants, including the State of Missouri.

These plaintiffs would not and do not relitigate the liability of the State defendants but would seek to determine the degree of culpability of the suburban school districts as they participated in or enforced the segregation laws of the State of Missouri. Further, we submit that any remedial determination does not require the relitigation of the liability of the City of St. Louis District or the State of Missouri. Their liability is fixed by the District Court and the Eighth Circuit Court of Appeals and this Court's denial of Certiorari. Further, these plaintiffs submit that the whole record supports their position that this settlement agreement is designed to eradicate the vestiges of a state mandated racially dual educational systems and establish a unitary system in the statutory St. Louis metropolitan school district. L.R. App. I

It should be noted that in Missouri, public education is made the responsibility of the State legislative authority- the General Assembly, and all persons or bodies exercising any of the

public educations authority do so as delegate agents of the State of Missouri. These include school districts and district constituents, even when voting on matters that may be called local by the State. Holmes, supra.

The Missouri State Constitution makes public school education the responsibility of the state general assembly. Within the realm of legal delegation of power, the legislature delegates certain of its authority to school districts to administer those facets of the education program or machinery that may vary from district to district and therefore need local flavoring; such as teacher employment, student assignments, school boundaries, building construction and maintenance, extracurricula programs, public use of buildings, etc.

The creation of every school district in suburbia, and the State of Missouri, was done pursuant to state legislation in Chapter 162 R.S. Mo. 1968.

The State of Missouri argues in its petition

for a Writ on page 26: "This Court has held on several occasions that students have no right to public education at all." (citations omitted) "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." These abstract statements are misleading and demonstrate the callous approach that Missouri takes to the equal protection of the law under the Fourteenth Amendment to the U.S. Constitution. It is elementary that education is a power reserved to the states and they (the states) may or may not afford public education. But, if the State does afford public education, it cannot discriminate based on race contrary to the Fourteenth Amendment, or laws enacted pursuant thereto.

On page 28, note 26 of the Petition, the State of Missouri makes an unbelievable statement: "While the State is willing to compensate for any deficiencies caused by its prior policies, there has been no showing that students now in

"non-integrated schools" have been put at an educational disadvantage because of the earlier state law."

The State of Missouri does not have clean hands. Every current non-integrated school was non-integrated in 1954 by state legislative mandate, or judicially made possible by the enforcement of racial restrive covenant protecting white neighborhoods from blacks renting or buying therein. See and compare also the State's Suggested Findings of Facts which were adopted verbatim by the District Court in its findings of facts. App. C and App. G.

The State argues that the State of Missouri cannot be derivatively liable as the governmental principal of the delegate agents school districts in their constitutional conduct toward the plaintiff class. This is not our contention.

Our contention is that the school districts derive their constitutional viability and liability from their status as delegate agents of the State of Missouri which has been found judicially to

be a constitutional (liable) wrongdoer for creating, mandating and maintaining a racially dual school system.

See Milliken vs. Bradley I where the U.S. Supreme Ct. rejected derivative liability of the state emanating from the district, the creature of the State.

We propose derivative liability of the district (the creature) emanating from the State, the creator and principal of the district, the delegate agent.

The State of Missouri participated very vigorously in the liability hearings. The State cross-examined witnesses and filed post-hearing suggested findings of Facts, Conclusions of law, and Order. It appears that it was the State's suggested findings of facts that partially influenced the District Court in making its findings of facts in 469 F. Supp. (Compare L.R. App. C with 469 F. Supp. l.c. Slip Opinion Pg. 11.)

Later, the State called witnesses in its behalf, filed other pleadings and fully partici-

pated, but never read the original Complaint or the Supplemental Complaint of the Liddell plaintiffs.

The State of Missouri was not adversely affected by the scheduled July 25, 1877 hearing as it was continued by the District Court to October, so that the State of Missouri could get ready for trial. See Slip Opinion, Pg. 7: "Findings of Facts" where it is stated:

"By order of July 14, 1977, the trial date was postponed to October 17, 1977, in order to permit the State defendants to prepare for trial."

Further, it is difficult to understand the sincerity of the State's and the City's position on the authority of the District Court to enter orders affecting the school district's tax levy, especially, in light of the fact that the State of Missouri was the first to suggest that the District Court should issue an order requiring the St. Louis City School District to increase its levy to cover its share of the desegregation costs. See Paragraph 7 of the State's Conclusions, Pre-Hearing Brief of 469 F. Supp.

The Association seems to argue that black children can not learn effectively in a school of all black students. We disagree, providing that the City Board does not isolate the all black schools from the remainder of the system thereby destroying the unitary school system. The physical facilities, the curriculum programs, and the dedication of the teachers and administrators along with the reducation of classroom sizes to a manageable level, motivated students and parents and discipline can produce a learning atmosphere throughout the system regardless of which race is in the majority. This is what is sought for the children in North St. Louis, and for the entire school system.

It is important to point out that these past pleadings and the evidence previously adduced are not included here for purposes of relitigation of issues already decided favorably to these plaintiffs; but to demonstrate that the State of Missouri had acknowledge of the claims made against it; that it had an opportunity to (and

did) participate fully in the proceedings where the State of Missouri was found to be a constitutional wrongdoer along with the City of St. Louis School District; that the State (when it chose to do so) called witnesses in its behalf at trial and deposition; that the State was at all times ably represented by very competent counsel, and is not the victim of a denial of due process.

CONCLUSION

The Liddell Plaintiffs respectfully submit that for the combined reasons stated in this Supplemental Response and in the joint Response, of the Proponents St. Louis Board of Education, the Liddell and Caldwell plaintiffs, the Application by defendant State of Missouri for the Writ of Certiorari to the Eighth Circuit Court of Appeals should be denied as no further review is necessary.

Respectfully submitted,

JOSEPH S. McDUFFIE

and

*WILLIAM P. RUSSELL
Attorneys for Defendants
408 Olive, Suite 206
St. Louis, Missouri 63102
(314) 621-4525

*Counsel of Record
July 31, 1984

Office - Supreme Court, U.S.
FILED
AUG 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ETC., *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

* JOHN M. CANNON
SUSAN W. WANAT
ANN PLUNKETT SHELDON
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 842
Chicago, Illinois 60606
(312) 263-5163

KENWYN A. REDDING
125 Collinsville Avenue
East St. Louis, Illinois 62201
(618) 274-1616
Attorneys for Petitioners

* Counsel of Record

Pandick Midwest Inc., Chicago • 454-7600

TABLE OF AUTHORITIES

PAGE

Cases

In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) 4

Mandujano v. *Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) 3

Constitutional Provision

U.S. Const. Amend. V (Due Process Clause) 3

No. 83-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION, ETC., *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners, as members of the plaintiff classes, objected that the proposed settlement of this class action to remedy racial segregation and discrimination in public schools of the St. Louis metropolitan area emphasized interdistrict busing to the detriment or frustration of other provisions to improve the schools which will continue to be used by at least one-half of the black student population in the city district. The court of appeals ruled that the district court's approval of the settlement without a reasoned response to petitioners' objections had not deprived them of due process of law because the settlement contains quality education provisions to compensate students who do not bus. (No. 83-1386 Pet. App. A460-A461; No. 83-1721 Pet. App. 71a-72a).

Neither the district court nor the court of appeals made any assessment of the *adequacy* of the quality education provisions to provide comparable programs for those black students who do not bus. Petitioners had not questioned the

"purpose" or the "intent" of the quality education provisions. On the contrary, petitioners questioned only the adequacy of such provisions, particularly in light of the disparagement and avoidance of city schools which may be occasioned by the massive busing of up to 15,000 black students from the city district to suburban districts.

The State of Missouri, *et al.*, petitioners in No. 83-1721, and the City of St. Louis, *et al.*, petitioners in No. 83-1386, as defendants had denied the necessity of both the interdistrict busing and the quality education provisions to remedy any constitutional violations for which they were responsible. Thus, the central issue posed in all three petitions seeking review of the judgment in this case is whether objections by both plaintiff and defendant parties necessitated the careful findings of fact required to ascertain whether the remedies are closely tailored to fit the wrongs at issue. No respondent has claimed that such findings were made. Clearly they were not.

1. The United States suggested that this Court summarily vacate the decision below and remand for further proceedings to supply the necessary findings. The brief for the United States focused on the inadequacy of the record to support the imposition of most of the costs of "settlement" on the State parties as the "primary constitutional wrongdoers." The brief does not explain why the very same findings are not required to support the imposition of the settlement on petitioners' civil rights claims over their objections in the first instance, or why such findings are not also required to impose any responsibility for the cost of the settlement's remedies on the City of St. Louis.[1]

[1] The City's obligation to provide revenue sufficient to fund the city board of education's share of the costs was qualified by the Eighth Circuit to require a prior finding of no alternative source of such revenue for the board. That qualification, however, does not render "premature" the City's petition in No. 83-1386 which fairly presents the question of whether the record is sufficient to support the imposition of responsibility for any remedy on the City even if the Eighth Circuit's qualification can be met.

The issue of cost is inextricably tied to the nature and scope of the relief. As to these petitioners, the brief states only that "there is no reason to believe that the district court failed to consider petitioners' written comments." (U.S. Br. at 34). Surely, the Due Process Clause of the Fifth Amendment requires more than that a district judge silently consider the objections of plaintiff class members before imposing a compromise of their civil rights claims upon them. The Ninth Circuit has held that due process requires a reasoned response to the objections of class members be set forth on the record together with the findings of fact and conclusions of law necessary to support that response. *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832, 835-36 (9th Cir. 1976). The decision below implies it does not and that important question of federal law is squarely presented by the petition.

2. The brief in opposition filed jointly by the respondents other than the United States and the City and State petitioners in Nos. 83-1386 and 83-1721, argues that the interdistrict busing provisions are "wholly voluntary" and "offered on an equal basis to *all* black students" attending one race city schools. (Resp. Br. in Opposition at 28) (emphasis in original). That is misleading. While the interdistrict busing remedy is "offered" to *all* such black students in good standing, the terms of settlement, in fact, make that remedy "available" to no more than *one-half* of such students. (No. 83-1386 Pet. App. at A413-14 and A420; No. 83-1721 Pet. App. at 23a-24a and 30a).[2] Moreover, on the existing record it is difficult, if not impossible, to assess how many of the black students who bus to suburban districts do so on a "wholly voluntary" basis or do

[2] The settlement directly limits the maximum number of black students who must be accepted by any suburban district to 25% of its total students. Statements that 30,000 black students would remain in one-race city schools without the settlement and that up to 15,000 of such students may bus to suburban districts under the settlement are based upon the application of that 25% limit to the anticipated student populations of the city and suburban districts.

so to avoid inferior programs in one race city schools where, as these petitioners assert, the quality education provisions of the settlement are inadequate to compensate those who do not bus.[3] Respondents identified nothing in the record to support their reliance on the court of appeals' conclusory assertion that the district court's lengthy opinion "reveals that it engaged in a reasoned examination" of petitioners' objections. In fact, the district court opinion had summarily noted only that opposition to the settlement existed, that it was not overwhelming in light of the nature of the suit, and that it had been considered. (No. 83-1386 Pet. App. A19-20; No. 83-1721 Pet. App. 113a-115a).

3. The supplemental brief filed by the Liddell respondents completely misapprehended petitioners' position. It suggests that these petitioners argue that "black children cannot learn effectively in a school of all black students." (Supp. Br. for Liddell Resp. in Opposition at 16). On the contrary, petitioners are an association of black parents who generally prefer to keep their children in neighborhood schools except to the extent that busing may be necessary to eliminate the continuing effects of past segregation. The settlement approved by the courts below frustrates their ability to do so. The entire focus of these petitioners' objections was that black students should not have to be bused to a predominantly white school in order to achieve a quality education. They objected to the massive interdistrict

---

[3] Respondents challenge petitioners' reliance on *In re General Motors Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979) *cert. denied*, 444 U.S. 870 (1979), as supporting a requirement of fairness to all class members. (Resp. Br. in Opposition at 28 n. 31). They assert that those who declined the GM cash offer received "no relief" whereas, here, those who do not bus receive "substantial relief." This is disingenuous. In terms of constitutional due process, the distinction between an alternative which affords no relief as opposed to comparatively little relief, lacks any meaningful difference. GM, at least, both "offered" the cash payment and, in fact, made that alternative "available" to *all* members of the plaintiff class. Here, the busing remedy is available to no more than *one-half* of the black students in the plaintiff classes.

busing of black students to white schools which the settlement encouraged without any showing of necessity and without any provision of comparable educational programs for those who do not bus.

CONCLUSION

The importance and substantiality of the question presented have not been denied by any respondent. The United States has recognized the inadequacy of the record to support the judgment. The other respondents opposing the petition argued that the interdistrict busing alternative will be "offered" to *all* black students who would otherwise remain in one race city schools. They failed to observe that, in fact, the busing alternative will be made "available" to no more than *one-half* of such students. They identified nothing in the record to support the adequacy of the quality education provisions as an alternative remedy for those who do not bus. Indeed, the inadequacy of the record to support the judgment is so evident that petitioners concur in the suggestion of the United States that summary action by this Court may be in order.

For these reasons and the reasons set out in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

KENWYN A. REDDING
125 Collinsville Avenue
East St. Louis, Illinois 62201
(618) 274-1616
Attorneys for Petitioners

* JOHN M. CANNON
SUSAN W. WANAT
ANN PLUNKETT SHELDON
MID-AMERICA LEGAL FOUNDATION
20 North Wacker Drive
Suite 842
Chicago, Illinois 60606
(312) 263-5163

* Counsel of Record